No. 81-2375

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IN THE

Supreme Court of the United States

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

(Motion for Rehearing Denied, March 8, 1982; Petition for Review by the Arizona Supreme Court Denied, March 30, 1982)

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Fourteenth Amendment, United States Constitution

ONE. Whether a State Court of Appeals and a State Supreme Court may fail to address federal questions once "drawn in question" in both oral arguments and written briefs by refusing to address the merits, the arguments or the authorities cited?

TWO. Whether a State Court of Appeals and a State Supreme Court may fail to address federal questions once "drawn in question" and ruled upon by the lower court?

THREE. Whether a State Court of Appeals and a State Supreme Court may cite federal authorities that do not support in fact, discussion, argument, merits, dicta or holdings, the proposition that the State Court of Appeals and the State Supreme Court desire to establish?

FOUR. Whether a State Court of Appeals and a State Supreme Court may reverse a lower court holding on the basis that the lower court erroneously "weighed the evidence" and then reach a holding that the higher courts themselves are privileged to weigh the same evidence to reach an opposite conclusion?

FIVE. Whether a State Court of Appeals and a State Supreme Court can ignore a State statute (A.R.S. § 41-785(D)) allowing any one of five separate grounds for appeal; appeal being taken on all five separate grounds, then rule for reversal on one single ground alone–refusing to recognize or address the substance of each of the other four separate grounds?

SIX. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court,

which had all the records before it at the time of lower court judgment, when the Chief Judge of the three judge Court of Appeals orally admits to the parties at the opening of oral argument that "all records of this matter from the lower court have disappeared from the files of the Court of Appeals?"

SEVEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court, when the Chief Clerk of the Court of Appeals, during attempts to reconstruct the record from files of appellant herein, states to appellant "I have been ordered only to reproduce the motions which have been previously submitted by both parties" and then declines to reproduce a full record from records offered to him?

EIGHT. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court by giving the coloration of "reasonable evidence" to the uncorroborated, entirely rebutted, and impeached testimony of a witness who had been forced to resign from his position in State government for being a thief?

NINE. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court by giving the coloration of "reasonable evidence" to the testimony of a second witness who later repudiated his testimony on cross-examination?

TEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court on the basis of three sub-paragraphs of a statute (A.R.S. § 41-770) when no "standards" have ever been promulgated by the State of Arizona, the Arizona State Personnel Board, or the Arizona Corporation Commission for any of the three

sub-paragraphs; the lower court having found at least one of the sub-paragraphs as "unconstitutionally vague." (*i.e.*, "improper attitude")?

ELEVEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court on the basis of ethical conduct (A.R.S. § 41-770) when the State has previously failed to promulgate any "standards of ethical conduct" as required by A.R.S. § 41-783(23)?

TWELVE. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court absent a holding that the lower court has violated the very essence of a scheme of ordered liberty, or at the very least has acted in an arbitrary and capricious manner by a finding by the appellate courts that a preponderance of the evidence in the record was to the contrary?

THIRTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court based on a self-serving rule promulgated by a state administrative agency (*i.e.*, State Personnel Board) that was above and beyond the power granted to it by statute, and thus an *ultra vires act*?

FOURTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court, by a holding that once a politically appointed laymen board of an administrative agency has "delegated its power to a duly appointed hearing officer" under A.R.S. § 41-785 and/or § 41-782.01(C), that that politically appointed laymen board of an administrative agency can publish its own self promulgated internal rule to allow itself to change the findings of fact, conclusions of law and decision of that hearing officer, to make findings of fact, conclusions of law and a

decision, where there were no charges, allegations or corroborated, unrebutted and unimpeached testimony to support the desired findings of a politically appointed laymen board of an administrative agency.

FIFTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court based on an assumption on its part that there was "reasonable evidence" in the record to the contrary—then fail to state what constituted "reasonable evidence", and also fail to state what evidence they found which constituted "reasonable evidence"?

SIXTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court when all of the "Exhibits" in the matter were withheld by the Court of Appeals and not forwarded to the State Supreme Court with which to adjudge a petition for review; the petition for review then being denied by the State Supreme Court without consideration of the record?

SEVENTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of a lower court by relying upon U.S. Supreme Court cases that are not only distinguishable but contain no issue, dicta or holding in support of the holding of the State Court of Appeals and the State Supreme Court?

EIGHTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of a lower court when the lower court found that a Personnel Board's finding of fact that appellant having pursued his administrative remedies by the statutory appeal process did not constitute "insurbordination"?

NINETEEN. Whether a State Court of Appeals and a

State Supreme Court can reverse the judgment of the lower court in the light of any one or more of the preceding violations of the First and Fourteenth Amendments to the Constitution of the United States; but when a total of some 19 violations are presented then is not such a flagrant abuse of judicial power no less than arbitrary and capricious?

First Amendment, United States Constitution

ONE. Whether a State Court of Appeals and a State Supreme Court can find the admitted discussion by a citizen of matters of public record, when there is no prohibition by state statute or administrative rule of such, to constitute "improper attitude" under A.R.S. § 41-770?

PARTIES

The parties to this proceeding are those listed in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the original hearing officer in the matter appears in the appendix hereto, p. 1a, *infra*. The opinion of the "trier of fact" at the evidentiary hearing appears in the appendix hereto, p. 3a, *infra*. The opinion of the Arizona State Personnel Board appears in the appendix hereto, p. 20a, *infra*. The memorandum opinion and order of the Superior Court on appeal appears in the appendix hereto, p. 24a, *infra*. The final judgment of the Superior Court on appeal appears in the appendix hereto, p. 32a, *infra*. The opinion of the Arizona Court of Appeals appears in the appendix hereto, p. 36a, *infra*. The motion for rehearing by the Arizona Court of Appeals appears in the appendix hereto, p. 46a, *infra*. The denial of the motion for rehearing by the Arizona Court of Appeals appears in the appendix hereto, p. 77a, *infra*. The denial of the petition for review by the Arizona Supreme Court appears in the appendix hereto, p. 79a, *infra*. The mandate of the Arizona Court of Appeals to the superior court for its further action appears in the appendix hereto, p. 105a, *infra*. The final judgment of the superior court in response to the mandate of the Arizona Court of Appeals appears in the appendix hereto, p. 109a, *infra*. The notice of appeal to the Supreme Court of the United States appears in the appendix hereto, p. 111, *infra*.

JURISDICTION

The judgment of the Court of Appeals of Arizona reversing the judgment of the Superior Court, County of Maricopa, State of Arizona, below, was entered on March 8, 1982. A motion for rehearing was entertained and denied. See p. 77a, *infra*. A petition for review by the Supreme Court of Arizona was entertained and denied, See p. 79a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of petition for review by the Supreme Court of Arizona, below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

JURISDICTIONAL STATEMENT

Lawrence J. Evans Jr., the Plaintiff, appeals from the final judgment of the Court of Appeals of the State of Arizona; Motion for Rehearing Denied, March 8, 1982; Petition for Review by the Supreme Court of Arizona Denied, March 30, 1982, as applied in this case, are not constitutional as being violative of appellant's right of free speech as guaranteed by the First Amendment of the Constitution of the United States; and as being violative of appellant's right of due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution

Congress shall make no law. . .abridging the freedom of speech.

Fourteenth Amendment, United States Constitution

. . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Article II, Section 3, Constitution of the State of Arizona

The Constitution of the United States is the supreme law of the land.

Article II, Section 4, Constitution of the State of Arizona

No person shall be deprived of life, liberty, or property without due process of law.

Article II, Section 6, Constitution of the State of Arizona

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Title 41, Arizona Revised Statutes, § 41-770

Each of the following constitutes cause for discipline or dismissal of an employee in the state service:

* * *

4. Improper attitude

* * *

6. Insubordination

* * *

14. Willful disobedience

* * *

Title 41, Arizona Revised Statutes, § 41-783(23)

The rules of the personnel board shall include:

* * *

The establishment of standards of ethical conduct for employees.

Title 41, Arizona Revised Statutes, § 41-785(B)

The personnel board, or a duly appointed hearing officer, shall conduct the hearing. . . .

Title 41, Arizona Revised Statutes, § 41-782.01(C) Added by Laws 1978

The board may delegate its power to investigate complaints, hold hearings and issue orders pursuant to this section to its duly appointed hearing officer. . . .

Title 41, Arizona Revised Statutes, § 41-785(D)

. . .the employee may appeal to the superior court of the county of residence *on one or more* of the following grounds, that the order was:

1. Found on or contained error of law which shall specifically include error of construction or application of any pertinent rules.

2. Unsupported by any evidence as disclosed by the

entire record.

3. Materially affected by unlawful procedure.
4. Based on violation of any constitutional provision.
5. Arbitrary and capricious.

(Emphasis added.)

Title 41, Arizona Revised Statutes, § 41-1010(1)

". . .Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative decision and order *providing the evidence supporting such decision or order is substantial*, reliable, and probative. . . ." (Emphasis added.)

RAISING THE FEDERAL QUESTION

At the earliest stage of the disciplinary proceedings below, federal questions were an integral part of the testimony received and the evidence introduced. The Hearing Officer, Judge Kopp, found for appellant. The politically appointed laymen Personnel Board disregarded in its entirety the findings of fact and conclusions of law of their own Hearing Officer to whom they had delegated their authority to conduct the hearing, and thereupon substituted its own findings of fact, conclusions of law and decision not based upon any charge, allegation, corroborated, unrebutted or unimpeached testimony or evidence in the record.

Upon appeal to the Superior Court of Arizona, the federal question was formally presented upon appeal as a violation of appellant's due process rights under the Fourteenth Amendment to the Constitution of the United States. Judge Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) found for appellant and found that so much of the statute as declared "improper attitude"

was unconstitutionally vague; and that the charges of "insubordination" and "willful disobedience" were not proven by the testimony and evidence submitted. The State of Arizona appealed.

Appellant again raised the federal question in Answering Brief to the Court of Appeals. The Court of Appeals failed to address the constitutional question, and reversed the Superior Court below. Appellant then filed a Motion for Rehearing enumerating therein some seventeen counts of violation of the plaintiff's rights of due process under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals summarily denied the Motion for Rehearing, without addressing one single count of violations of the federal question.

Appellant then filed a Petition for Review to the Supreme Court of Arizona, which consisted of the seventeen counts of violations of the federal questions being submitted to it by the Court of Appeals. The Supreme Court of Arizona also summarily denied the Petition for Review without addressing one single count of violations of the federal question.

STATEMENT OF THE CASE

On the 25th day of October, 1975 appellant had been directed not to utilize his title of Chief Hearing Officer or to exercise his supervisory responsibilities over his subordinates. However, he was carried on the books and records of the State of Arizona as Chief Hearing Officer and was paid as such through June 30, 1976, nine days after he was terminated. Also, his Job Title, Job Description and his position of Chief Hearing Officer was not reclassified until the 22nd day of June, 1976, one day after he was terminated.

On the 18th day of June 1976, without notice to or knowledge of the appellant, the then Executive Secretary, Donald E. Vance, in executive session, *in camera*, did make certain allegations to two of the three Commissioners, Ernest Garfield and B. L. "Bud" Tims. As a result of these allegations, *and without discussing them with appellant*, the two Commissioners did order the Executive Secretary, Donald E. Vance, to remove appellant ". . . on two counts: (1) Total insubordination, and (2) Attitude."

The appellant thereafter filed his timely notice of appeal contesting the three charges and six allegations as set forth by appellees in their termination letter of June 21, 1976.

The first Hearing Officer assigned the case found for appellant, the State of Arizona not being able to willing to proceed after one year and four months. See Appendix, p. 1a.

The trier of fact at the evidentiary hearing, Judge Ellis M. Kopp, reached the following two findings of fact:

> "1. That the Respondent [appellees herein] has failed to prove by a preponderance of the evidence the existence or validity of any of the six reasons for dismissing Appellant from state service as stated in the Dismissal Letter.
>
> 2. That the evidence did not establish that Appellant was guilty of willful disobedience, insubordination or had an improper attitude."

The trier of fact, Judge Ellis M. Kopp, reached the following single conclusion:

> "That Appellant did not violate the provisions of ARS 41-770 A. 4.6 14 and therefore should not have been dismissed by Respondent [appellee herein]."
>
> (See Appendix, p. 3a)

The Arizona State Personnel Board then rejected the trier

of fact's findings of fact, conclusions of law, and recommendation, and substituting therefor, its own findings of fact and conclusions of law. See Appendix, p. 20a).

Appellant immediately exercised his statutory right of appeal under the provisions of A.R.S. § 41-785 D, and filed his timely notice of appeal in the Superior Court of Maricopa County on all five statutory grounds allowable for an appeal.

On July 31, 1979 the Honorable Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) under the Arizona Rules of Civil Appellate Procedure, issued his MEMORANDUM OPINION AND ORDER (see Appendix, p. 24a) reversing the order of the Arizona State Personnel Board and remanding the case to the Personnel Board to determine the position to which the appellant should be reinstated and the amount of back pay that was owed to appellant. Appellant, in accordance with the Memorandum Opinion and Order, submitted a proposed final judgment. Appellee herein objected to the form and content of the proposed final judgment. Consequently, without unanimity of agreement between the litigants, the Judge issued his own Final Judgment. (See Appendix, p. 32a).

The oral arguments were heard by the Arizona Court of Appeals on October 5, 1981. The OPINION of the Arizona Court of Appeals was filed on February 2, 1982, reversing the lower court's judgment. A timely Motion for Rehearing submitting one violation of free speech and supplemented by sixteen further violations of due process and free speech, as violative of appellant's rights under the First and Fourteenth Amendments to the United States Constitution, was entered on February 11, 1982.

The Motion for Rehearing was summarily denied on March

8, 1982 without addressing any of the seventeen federal questions presented. A timely Petition for Review was filed with the Arizona Supreme Court on March 10, 1982. The Arizona Supreme Court also summarily denied the petition for review on March 30, 1982, without addressing any of the seventeen federal questions presented.

FACTS BEARING ON THE FEDERAL QUESTIONS PRESENTED

The judicial appellate reversal of a Superior Court reversal of a politically appointed administrative board of laymen which, without any corroborated, unrebutted, and unimpeached evidence in the record, *totally and completely* rejected *all* findings of fact of its statutorily authorized Hearing Officer to whom it had delegated its duties is the gravamen of the case or controversy. This politically appointed administrative board of laymen then substituted its own findings of fact for which there were no charges or allegations in the record, in order to reach unreasonable and unsupported conclusions of law so as to overrule its statutorily authorized Hearing Officer in whom an Arizona statute authorized that the Personnel Board's duties and responsibilities be delegated.

The facts are hereafter presented in concise form in chronological sequence to the federal questions presented. Some of the facts presented are similar or identical and may on their face appear repetitious, but the federal questions presented are dissimilar wherein the same facts apply to differing federal questions.

Article II, Section 3, Constitution of the State of Arizona states: "The Constitution of the United States is the supreme law of the land." By this constitutional edict all

questions of due process, freedom of speech and other constitutionally protected rights automatically become "federal questions" without having to be "drawn."

STATEMENT OF FACTS

ONE. Whereas it has been held that an administrative agency has the power to overrule the conclusions and recommended decision of its designated hearing officer, to whom it has delegated the authority and responsibility to conduct a fair and impartial hearing, *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S. Ct. 816, 81 L. Ed. 1143, it is believed that this is a case of first instance wherein the administrative agency has rejected all of the findings of fact, conclusions of law and reached an opposite decision not based upon any charge, any allegation, any corroborated, unrebutted or unimpeached evidence in the record. A report which suppresses or omits testimony of such a character as might determine the result in a case is not a fair report and it operates as a denial of a fair hearing to one aggrieved by a decision based wholly on it. *Kwock Van Fat v. White*, 253 U.S. 454, 40 S. Ct. 566, 64 L. Ed. 1010. This is the gravamen of the offense when some seventeen federal questions have been "drawn in question" in both oral arguments and written briefs and both the Arizona Court of Appeals and the Arizona Supreme Court fail to address the merits, the arguments or the authorities cited.

TWO. We have here a situation wherein the lower court has addressed a "federal question" and has found a portion of a state statute "unconstitutionally vague." In a most arbitrary and capricious manner the Arizona Court of Appeals and the Arizona Supreme Court have not only reversed the lower court, *but did so without even addressing*

the merits of the federal question, the arguments presented, or the authorities cited.

This action being an event of such an unprecedented abuse of judicial discretion, appellant is unable to discover any federal citations wherein any other appellate court in any other jurisdiction has acted in a like dictatorial, arbitrary and capricious manner.

This action is not merely an error of law; it is an outright abuse of judicial discretion directly aimed at the constitutionally protected rights of a citizen.

THREE. An assignment of material prejudicial error in addition to the previous federal questions noted, *supra*, is that the Arizona Court of Appeals and the Arizona Supreme Court erroneously justified their holding by stating:

> "We find nothing constitutionally infirm in this procedure. The Personnel Board possesses no supervisory authority over the state employees whose appeals it hears and therefore satisfies the requirements of being a fair and impartial tribunal." See, *Perry v. Sinderman*, 408 U.S. 593 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

A review of *Perry v. Sinderman* and of *Goldberg v. Kelly* reveals that no such issue was presented in either case; no dicta supplied; and no holding that an independent politically appointed board of laymen, because it possesses no supervisory authority over the state employees whose appeals it hears, therefore satisfies the requirements of being a fair and impartial tribunal. The Arizona Court of Appeals and the Arizona Supreme Court have herein made a reversible error of law.

FOUR. In civil cases the fact finder's duty is to weigh the evidence carefully and to find for the party in whose

favor it preponderates. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S. Ct. 658, 28 L. Ed. 2d 64. In the instant case the "trier of fact", Judge Ellis M. Kopp, at the evidentiary hearing found that the preponderance of the evidence was not in favor of appellees and therefore held in favor of appellant. Again at the Superior Court level, Judge Charles L. Hardy (now Federal District Judge, District of Arizona), could not find a preponderance of the evidence in favor of appellees and therefore held in favor of appellant.

Of even greater weight is the fact that the Court of Appeals in its holding did not find a preponderance of the evidence in favor of appellees and quite incongruously "weighed the evidence" at this tertiary appellate level and held upon an ambiguous, undefined and considerably lesser degree that "reasonable evidence" was in the record to support the appellee's position. Without defining "reasonable evidence" and without citing what evidence constituted the "reasonable evidence" in the record, it reversed the lower court and substituted in its opinion the opinion of the Personnel Board. The Arizona Supreme Court refused to review this unprecedented judicial act.

FIVE. Appeal in this matter was taken, under the provisions of A.R.S. § 41-770, to the Arizona Personnel Board upon five separate grounds. The Arizona Court of Appeals and the Arizona Supreme Court addressed but one ground, and failed to address the evidence, arguments and authorities submitted on each and all of the other four separate grounds for appeal.

A finding without substantial evidence to support it is an arbitrary or capricious finding and does violence to the law. It is without the sanction of the authority conferred.

And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon or involve the exercise of administrative authority. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 58 S. Ct. 627, 89 A.L.R. 406, 77 L. Ed. 1166.

"Substantial evidence", within the meaning of the provision of 5 U.S.C. § 1009(e)(5) that a reviewing court shall set aside agency action, findings, and conclusions found to be "unsupported by substantial evidence", must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of the evidence. *Illinois Cent. R. Co. v. Norfolk & West. R. Co.*, 385 U.S. 57, 87 S. Ct. 255, 17 L. Ed. 2d 162.

Both the Arizona Court of Appeals and the Arizona Supreme Court failed to cite any "substantial evidence" that they could find that justified reversal of the other four separate grounds, or to the fifth separate ground of appeal.

SIX. A court may not overturn a determination made by an administrative agency upon a question committed to the agency's judgment *unless the determination is unsupported by substantial evidence, and the substantiality of the evidence must be measured through, and only after, an examination of the whole record.* (from separate opinion by Harlan and Stewart, J. J.) *Udall v. Federal Power Comm.*, 387 U.S. 428, 87 S. Ct. 1712, 18 L. Ed. 2d 869. (Emphasis added.)

It is respectfully submitted that neither the finder of fact at the evidentiary hearing, Judge Ellis M. Kopp, nor Judge Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) at the Superior Court

level could find substantial evidence, upon an examination of the whole record, to support the Personnel Board's findings.

Assuming that the Court of Appeals was able to partially reconstruct the record from below, there was no effort made to allow appellant to be assured that the complete record from the evidentiary hearing and the Personnel Board hearing, as well as the Superior Court hearing was completely reconstructed, or that some extraneous material had not since been entered by party or parties unknown.

Obviously, under such conditions a situation exists wherein there is a substantial question as of fairness and impartiality in the judicial review.

SEVEN. As in SIX, preceding, the United States Supreme Court has held that a judicial review of a determination made by an administrative agency can only be measured by a finding that there was substantial evidence to support the administrative agency's findings; and also only after an examination of the whole record. (from separate opinion by Harlan and Stewart, J. J.) *Udall v. Federal Power Comm.*, 387 U.S. 428, 87 S. Ct. 1712, 18 L. Ed. 2d 869.

Assuming that the Court of Appeals succeeded only in reconstructing "the motions which have been previously submitted by both parties to the Court of Appeals" then this obviously does not constitute the whole record.

It is respectfully submitted that both the finder of fact at the evidentiary hearing, Judge Ellis M. Kopp, and Judge Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) at the Superior Court level had the whole record before them when they both held that there was not substantial evidence in the record to

support the administrative agency's findings.

EIGHT. The record will reflect that the Executive Secretary, Donald E. Vance, was subsequently investigated by an Arizona Senate Special Investigating Committee and evidence was introduced that he had been defrauding the State of Arizona. This man, who was allowed to resign and seek employment in the private sector, was found by the "trier of fact" in the evidentiary hearing, Judge Ellis M. Kopp, as to not have sufficient credibility to outweigh contradicting testimony. This was so stated in Judge Kopp's findings of fact, conclusions of law and recommended order. The "trier of fact" is to determine which version of conflicting evidence is to prevail and weigh evidence accordingly. *Hickey v. Celebrezze*, 229 F. Supp. 5 (D. Okla. 1964). See Appellant's Notice of Service of First Set of Requests for Admissions and Non-Uniform Interrogatories, pages 74a (Exhibit 148), 75a (Exhibit 150), 77a (Exhibit 154B), 79a (Exhibit 158).

In addition, it has long been held that in equity a sworn answer called for under oath must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances. *Latta v. Kilbourn*, 14 S. Ct. 201, 150 U.S. 524, 37 L. Ed. 1169; *Vigel v. Hopp*, 104 U.S. 441, 26 L. Ed. 765; *May v. Sloan*, 101 U.S. 231, 25 L. Ed. 797.

The testimony of Mr. Donald E. Vance was completely rebutted, was entirely uncorroborated, and his reputation for truth and veracity was impeached. The sworn answer of appellant called for under oath was not overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances.

NINE. The record will reflect that the testimony of Andrew Bettwy Jr., quoted by appellees in their briefs, was repudiated by this witness upon cross-examination. He freely admitted upon cross-examination that the comment he recalled could have been made by another person and not by the appellant. (See Transcript, Vol. VIII, p. 96, lines 19-26). He also freely admitted upon cross-examination that his sole contact with appellant was "more or less seeing him and waving and saying: Hello, how are you?" (See Transcript, Vol. VIII, p. 99, lines 18-23).

In addition, it has long been held that in equity a sworn answer called for under oath must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances. (See citations in EIGHT, *supra.*) The testimony of Mr. Andrew Bettwy Jr. was completely rebutted, was entirely uncorroborated, and he repudiated said testimony upon cross-examination.

TEN. An act of the legislature, to have force and effect of a law, must be intelligibly expressed. *Baker v. Downey City Bd. of Ed.*, 307 F. Supp. 517 (D. Cal.), and statutes which are too vague to be intelligible are a nullity. *Weeds v. United States*, 41 S. Ct. 306, 255 U.S. 109, 65 L. Ed. 537 (N.Y.); *Boutilier v. Imm. and Natural. Svc.*, 87 S. Ct. 1563, 387 U.S. 118, 18 L. Ed. 2d 661 (N.Y.); *Barnett v. D'Artois*, 331 F. Supp. 1310 (D. La.).

Certainty being one of the prime requisites of a statute *Durbame v. State Tax Commission*, 65 Ariz. 268, 179 P.2d 252, 171 A.L.R. 684, a statute in order to be valid must be definite and certain. *Wallace v. Brewer*, 315 F. Supp. 431 (D. Ala.); *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854.

A statute of uncertain meaning will not readily be made an instrument for much hardship and confusion. *Zellerbach Paper Co. v. Helvering*, 55 S. Ct. 127, 293 U.S. 172, 79 L. Ed. 264.

The term "improper attitude" being overly broad and unconstitutionally vague was found by the Superior Court below. In an administrative agency wherein the respective Commissioners are politically elected, the mere technicality of being registered with the opposite political party can be tantamount to "improper attitude." The failure of a state employee to contribute a sufficiently large enough sum to his politically elected Commissioner's campaign fund can be viewed as "improper attitude." This term, as used, is unconstitutionally vague and guilty of overbreadth, and was so found by the Superior Court below. The statute not being narrowly drawn, and there having been no "standards" promulgated by the State of Arizona, as required by Title 41, Arizona Revised Statutes, § 41-783(23), or by the Arizona Corporation Commission by internal rules, it is submitted that it is impossible to define this term with definiteness and certainty.

Reasonable definiteness and certainty is required in statutes, *Hunter v. Allen*, 422 F.2d 1158 (C.A. Ga.), *reversed on other grounds*, 91 S. Ct. 1237, 401 U.S. 989, 28 L. Ed. 528, *mand. conf. to* 443 F.2d 1359; *Whitfield v. Simpson*, 312 F. Supp. 889 (D. Ill.); *State v. Starsky*, 106 Ariz. 329, 475 P.2d 943.

When so much of A.R.S. § 41-770 reads "improper attitude" is so imperfect as to render it impossible to execute it or to ascertain the legislative intent, then that part of the statute is a nullity. The term "improper attitude" is capable

of being molded into whatever shape the employer desires, varying it at will according to the circumstances of the moment.

Being subjected to the vicissitudes of the whims of the moment rather than to the objective and clearly defined parameters of acceptable conduct, is a clear and abusive violation of appellant's rights of due process under the Fourteenth Amendment to the Constitution of the United States.

ELEVEN. The United States Supreme Court has long held that requisite "standards" must be promulgated to permit any statute or law to escape constitutional infirmity for "vagueness." *Zwickler v. Koota*, 88 S. Ct. 391, 389 U.S. 241, 19 L. Ed. 2d 444, *on remand* 290 F. Supp. 244, *reversed; Golden v. Zwickler*, 89 S. Ct. 956, 394 U.S. 103, 22 L. Ed. 2d 113; *American Comm. Assn. C.I.O. v. Douds*, 70 S. Ct. 674, 339 U.S. 382, 94 L. Ed. 925, *rehearing denied*, 78 S. Ct. 1017, two cases, 339 U.S. 990, 94 L. Ed. 1391.

The "standards test" has been best judicially delineated by a state supreme Court in *Westervelt v. Natural Resources Commission*, 420 Mich. 410, 263 N.W.2d 564, 575, wherein it was held:

> "At present, the applicable test for determining whether legislation contains an unconstitutional delegation of legislative power is the 'standards test'; under the 'standards test', which is rooted in the constitutional doctrines of due process and separation of powers, legislation delegating power to an administrative agency must contain either explicitly or by reference standards to prescribe for guidance which are as reasonably precise as the subject matter of the legislation requires or permits."

Arizona Revised Statutes, § 41-783(23) requires that the

Personnel Board shall establish "standards" of ethical conduct for employees. Said "standards" were never established by the Personnel Board, nor were any "standards" promulgated by the Arizona Corporation Commission.

TWELVE. The Arizona Court of Appeals and the Arizona Supreme Court did not hold that a preponderance of the evidence in the record was to the contrary of the holding of the Superior Court below. In civil cases the fact finder's duty is to weigh the evidence carefully and to find for the party in whose favor it preponderates. *Ramsey v. United Mine Workers*, 91 S. Ct. 65, 401 U.S. 302, 28 L. Ed. 2d 64.

In general, it may be said that the proceedings in a trial court should be upheld unless they violate the very essence of a scheme of ordered liberty. *Fitzgibbons v. Hancock*, 97 N.H. 162, 82 A.2d 769; C.J.S. 16A, § 567, pp. 541-42. The opinion of the Court of Appeals and of the Arizona Supreme Court does not indicate a "violation of a scheme of ordered liberty" by either Judge Ellis M. Kopp at the evidentiary hearing or by Judge Charles L. Hardy (since appointed Judge, Federal District Court, District of Arizona) at the Superior Court judicial review appellate proceedings.

In the evidentiary hearing held the "trier of fact", Judge Ellis M. Kopp, did not find any preponderance of evidence for the appellees and ruled in favor of the appellant. The Arizona Personnel Board in its review did not find any preponderance of evidence for the appellees but reversed the trier of fact, substituting in its order findings of fact not based upon any charge, any allegation, any corroborated evidence or testimony, any unrebutted evidence or testimony, and upon impeached testimony.

The Superior Court in its review did not find any

preponderance of evidence for the appellees in the record and reversed the order of the Personnel Board.

THIRTEEN. Although generally speaking "ultra vires" acts have been restricted to corporation actions in excess of the express or implied powers of the corporation's charter, the courts have addressed the same limitations upon administrative agencies and upon municipal corporations. (Citations omitted.)

The formulation of an internal rule or regulation by the state personnel board giving itself the power to reject *all* findings of fact made by the "trier of fact", to whom it has delegated its powers, duties and responsibilities under the authority of A.R.S. § 41-785(B) and A.R.S. § 41-782.01(C), is in and of itself an "ultra vires" act. The powers that the Personnel Board has promulgated for itself by its own internally promulgated rule or regulation are beyond those granted by statute.

The position of the appellant is legally defined and argued definitively in Appendix N of Appellant's [Appellee below] Answering Brief by Amicus Curiae, referred to on page 65a, Appellant's Motion for Rehearing.

FOURTEEN. Rules and regulations of a public administrative agency duly promulgated and adopted in pursuance of properly delegated authority have the force and effect of law where they are legislative in character, but rules and regulations which are merely executive or administrative views as to the meaning and construction of the statute are not controlling on the courts. *Cory Corporation v. Sauber*, 266 F.2d 58, 61 (C.A. Ill.), *rehearing denied*, 267 F.2d 802, *reversed on other grounds*, 80 S. Ct. 1331, 363 U.S. 709, 4 L. Ed. 2d 1508, and cannot alter or extend the plain meaning of a statute. *American Trucking Associations v. Atchison*,

T. & S.F. Ry. Co., 87 S. Ct. 1608, 387 U.S. 397, 18 L. Ed. 2d 847 (Ill.), *rehearing denied*, 88 S. Ct. 11, 389 U.S. 889, 19 L. Ed. 2d 197 and 88 S. Ct. 12, two cases, 389 U.S. 889, 19 L. Ed. 2d 197.

The Supreme Court of Arizona has held in *Dennis v. Jordan*, 71 Ariz. 430, 229 P.2d 692, that:

> "In the recent case of *Haggard v. Industrial Commission of Arizona*, 71 Ariz. 91, 223 P.2d 915, 921, we recognized that the ordinary rule is that legislative powers cannot be delegated to administrative bodies but point our: * * * * this does not mean that when authorized to do so by the act itself administrative bodies may not make rules and regulations *supplementing* legislation for its complete operation and enforcement, *if such rules and regulations are within the standards set forth in the act of the legislature.*" (Emphasis supplied by the Court.)

By the Personnel Board having promulgated an internal rule or regulation giving itself the power to change the findings of fact of its own Hearing Officer, who took the evidence in the absence of the Personnel Board, in whom the Legislature has granted only the power to "delegate its powers to investigate complaints, hold hearings and issue orders pursuant to this section. . . ." (See A.R.S. § 41-785 (B) and see A.R.S. § 41-782.01(C)) it has gone beyond the standards set forth by the Legislature. Thus its order is a nullity. So should the Arizona Court of Appeals and Arizona Supreme Court have held.

FIFTEEN. The Administrative Procedure Act of Arizona is quite specific and unambiguous. In A.R.S. § 41-1010(1) it states:

> ". . . Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any

> administrative decision and order *providing the evidence supporting such decision or order is substantial, reliable, and probative. . . .*" (Emphasis added.)

The Administrative Procedure Act of the United States government is equally specific and unambiguous. In U.S. Code, Chapter 5, § 556(d) it states:

> ". . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence. . . .*" (Emphasis added.)

It is clear in the record that the "trier of fact", Judge Ellis M. Kopp, did not find any substantial evidence in the evidentiary hearing. It is equally clear that the Superior Court, Judge Charles L. Hardy presiding, did not find any substantial evidence in the judicial review of the administrative decision. It is also equally clear that the Arizona Court of Appeals and the Arizona Supreme Court did not find any substantial evidence in their appellate review; but, instead, came to a holding that a lesser degree of evidence, that of "reasonable evidence" was sufficient to reverse the decision of the lower court, contravening existent legislative law and existent case law thoroughly briefed in Appellant's Motion for Rehearing filed with the Arizona Court of Appeals. (See Appendix, p. 46a.)

The federal courts have held that the "trier of fact," in this case Judge Ellis M. Kopp, is the only one to determine which version of conflicting evidence is to prevail. *Hickey v. Celebrezze*, 229 F. Supp. 5 (D. Okla. 1964).

Even when by statute an administrative agency is not bound by the rules of evidence, and even though the agency may in its discretion accept any evidence that is offered,

there must nevertheless be a residuum of legal evidence to support the determination made by the agency. *U.S. ex rel. Dong Wing Ott v. Shaughnessy,* 116 F. Supp. 745 (D.N.Y. 1953).

To reach a finding of fact, a conclusion of law and a reversal of the lower court on the grounds of a lesser degree of evidence; then not to define the lesser degree of evidence; then not to specify of what that lesser degree of evidence consisted; and to do this after the conclusion of the submission of all briefs and motions precluded appellant herein of the basic rudiments of a fair and impartial appellate review, constitutes an unfairness of sufficient substance to constitute a real and substantial controversy as to the effect of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The United States Supreme Court has held that where the findings of an administrative board "*are supported by substantial evidence*" they must be accepted. (Emphasis added.) *National Labor Relations Board v. Brown,* 380 U.S. 278, 85 S. Ct. 980, 13 L. Ed. 2d 839; *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 85 S. Ct. 1012, 380 U.S. 359, 13 L. Ed. 2d 895.

The appellant herein included in briefs to the Superior Court and to the Arizona Court of Appeals and the Arizona Supreme Court, and in particular in his motion for rehearing, statements in legal and logical form which averred a dispute or controversy as to the effect of the due process clause of the Fourteenth Amendment to the Constitution of the United States, upon the determination of which the result depended. None were addressed by either the Arizona Court of Appeals or the Arizona Supreme Court.

SIXTEEN. Included in the appendix hereto at p. 103a, is

a copy of the letter of transmittal from the Arizona Court of Appeals to the Arizona Supreme Court, indicating therein that all Exhibits in the record below were withheld ". . .pending disposition of Arizona Supreme Court."

The United States Supreme Court has held in *Goldberg v. Kelly*, 397 U.S. 254 (1970) that:

> ". . . the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co. v. PUC*, 260 U.S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."

The Exhibits withheld from the Arizona Supreme Court included, among other vital items of evidence:

EXHIBIT B. That appellant could not possibly have had the required opportunity to sign the PDQ in the period of time indicated–he having been terminated prior to this time.

EXHIBIT E. That appellant was carried on the rolls of the State of Arizona as Chief Hearing Officer and paid as such up until the time of his termination–therefore, he could not be guilty of falsely saying that he was Chief Hearing Officer.

EXHIBIT F. That an employee of the Arizona Corporation Commission was induced by duress and threats of both job security and the vesting of his pension rights if he did not write a memorandum unfavorable to appellant, for the use of the Commission to justify the termination of appellant.

EXHIBIT H. That appellant's adaptability, cooperation, dependability, punctuality, ambition, initiative, self-discipline, judgment, integrity, professionalism, decisiveness, understanding, respect and confidence of fellow employees,

ingenuity, appearance, willingness to accept and act upon suggestions and constructive criticism, etc., were rated in document form by the Arizona Corporation Commission as either "exceptional performance" or "exceeded standards in most objectives" during this period.

EXHIBIT O. That appellant's position was never downgraded from Chief Hearing Officer until June 22, 1976—one day *after* he was terminated.

EXHIBIT P. That the problems of the Commission were public knowledge as expressed in the media.

EXHIBIT T. That the Chairman of the Arizona Corporation Commission at the time publicly announced to the press: "There's nothing that we do or say that should be kept from the public anyway. It's the public business—they pay for it."

SEVENTEEN. An assignment of material prejudicial error in addition to the previous federal question noted, *supra*, is that the Arizona Court of Appeals and the Arizona Supreme Court erroneously justified their holding by stating:

> "We find nothing constitutionally infirm in this procedure. The Personnel Board possesses no supervisory authority over the state employees whose appeals it hears and therefore satisfies the requirements of being a fair and impartial tribunal." See, *Perry v. Sinderman*, 408 U.S. 593 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

A review of *Perry v. Sinderman* and *Goldberg v. Kelly* reveals that no such issue was presented in either case; no dicta supplied; and on holding that an independent politically appointed board of laymen, because it possesses no supervisory authority over the state employees whose appeals it hears, therefore satisfies the requirements of being a fair and

impartial tribunal. The Arizona Court of Appeals and the Arizona Supreme Court have herein made a reversible error of law.

By the Arizona Court of Appeals and the Arizona Supreme Court relying upon not only distinguishable cases, but cases which are completely and utterly not in support of its presumption, it has acted in an arbitrary and capricious manner.

EIGHTEEN. An absolutely amazing finding of fact made by the Personnel Board (Finding of Fact No. 2) and given the coloration of approval by the Arizona Court of Appeals and the Arizona Supreme Court was that:

> "in papers filed by the Appellant *subsequent to the hearing* he has continued to argue that the Hearing Officer in Tucson is illegal, thus criticising the Commissioners in the performance of their management prerogatives." (Emphasis added.)

and from this reached a Conclusion of Law (Conclusion of Law No. 2):

> "That Appellant's *continued reference* to the illegal Hearing Officer in Tucson * * * constituted insubordination under A.R.S. § 41-770." (Emphasis added.)

This was a violation of appellant's due process rights under the Fourteenth Amendment to the Constitution of the United States, and also of his statutory rights to pursue his administrative remedies. This was akin to saying: "You were accused of an act, your denial or explanation of that act in the hearings and in the briefs required to be submitted after the hearings constitutes insubordination."

By this decision, conclusive on its face, the Arizona Court of Appeals and the Arizona Supreme Court have decreed the the death of an individual citizen's rights to pursue his administrative remedies and to receive a fair and impartial

appellate judicial review in the State of Arizona.

NINETEEN. The general meaning of "arbitrary and capricious" is, "with not *substantial* evidence to support it", and "conclusion contrary to *substantial* competent evidence." *East Tex. Motor Freight Lines v. U.S.*, 96 F. Supp. 424, 427 (D. Tex.) (emphasis added); *In re Rogers*, 47 F. Supp. 265, 266 (D. Tex.) (emphasis added).

When a total of more than 17 errors involving federal questions properly drawn, involving violations of due process under the Fourteenth Amendment to the Constitution of the United States and involving a violation of the right of free speech under the First Amendment to the Constitution of the United States, are presented to a state court of appeals in a Motion for Rehearing and that state court of appeals peremptorily denies the motion for rehearing without addressing a single question or a single authority; and when a state supreme court peremptorily denies a petition to review the same more than 17 errors involving federal questions properly drawn; then the inference, the implication and the assumption must be clearly drawn- this was an arbitrary and capricious abuse of judicial power.

First Amendment, United States Constitution

ONE. Regulatory measures, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of rights guaranteed by the First Amendment. *Louisiana ex rel. Gremillion v. Nat. Assoc. for Adv. of Colored People*, 81 S. Ct. 1333, 366 U.S. 293, 6 L. Ed. 2d 301. Freedom of speech and freedom of the press are properly classed as fundamental personal rights and liberties, since they lie at the foundation of free government by free men. *Schneider v. Irvington*, 60 S. Ct. 146, 308 U.S.

147, 84 L. Ed. 155.

The depth and absurdity of the Personnel Board's finding of fact No. 4 was given the seal of approval by the Arizona Court of Appeals on page 6 of the Court of Appeals opinion, to-wit:

> "That Appellant by his own admission discussed Commission business with outside parties other than legal counsel." (See Appendix, p. 41a.)

There is no known prohibition of law, nor has there ever been one to prohibit discussing matters of public record, or of that which has been published in the press.

The Arizona Court of Appeals opinion gives further seal of approval to this absurd conclusion of law No. 4, which the Personnel Board derived from such an unlawful finding of fact as described above, by its finding that there was "reasonable evidence" to support such a Personnel Board opinion and order.

In a press release issued by the then Chairman of the Arizona Corporation Commission, Ernest Garfield, and printed in the *Phoenix Gazette*, dated April 14th, 1976 (Vol. VI, p. 98, lines 9-26; p. 99, lines 1-2) and in Exhibit T, the Appellees have admitted the falsity of this charge, to-wit:

> "Garfield said, he wasn't much concerned whether there were bugs in his office or not; *there's nothing we do or say that should be kept from the public anyway. It's the public business.* They pay for it." (Emphasis added.)

This unconscionable granting of the coloration of credibility and the force and effect of law to an unreasonable finding of fact and conclusion of law introduced by the politically appointed laymen Personnel Board constitutes a gross violation of appellant's constitutional rights of due

process under the Fourteenth Amendment to the Constitution of the United States, and also to appellant's constitutional rights of free speech under the First Amendment to the Constitution of the United States.

THE QUESTION IS SUBSTANTIAL

The question as to the Fourteenth Amendment implications of a State Court of Appeals and State Supreme Court violating the due process property rights of a citizen by totally ignoring them strikes at the very heart of the American judicial system. Although often addressed in criminal actions and sometimes in civil actions, the gravamen of the violation is usually directed to a subdivision of the executive department of a State government. It is the belief of the Appellant herein that gross violations of the Fourteenth Amendment and First Amendment rights of a citizen by the judicial department of the State government have never been treated before by this Court.

The judiciary of our State governments must be as circumspect as "Caeser's wife." Violations as simple error have been excused in the past. But no known such cumulative and flagrant violations of a citizen's rights under the Constitution of the United States, and, indeed, under the Constitution of the State of Arizona by the appellate judiciary therein has been discovered by Appellant.

It is respectfully submitted that appellate courts must observe the same inherent constitutional rights of a citizen as do the trial courts. To refuse to recognize properly drawn federal questions by totally ignoring them without reaching one single argument on the merits, by totally ignoring U. S. Supreme Court holdings, by citing U. S. Supreme Court

holdings that are not only distinguishable but completely inapposite to a finding of fact and conclusion of law reached by the appellate court, to reverse a lower court which had the entire record before it while the appellate court admitted in open court that "all of the records in this matter have disappeared from the Court of Appeals," to refuse to accept an offer by appellant to reconstruct the record from his files by an order to the Chief Clerk of the Court of Appeals to reconstruct only the Motions which its records indicated had been previously filed—then not to rule on one single Motion, and to give the coloration of credibility to uncorroborated, completely rebutted and impeached evidence, can only be said to be so arbitrary and capricious as to create a "substantial question" before the Supreme Court of the United States.

CONCLUSION

For these reasons this Court should note jurisdiction of this appeal.

Respectfully submitted,

LAWRENCE J. EVANS JR.
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81-2375

No. _____

Office - Supreme Court, U.S.
FILED
JUN 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

(Motion for Rehearing Denied, March 8, 1982; Petition for Review by the Arizona Supreme Court Denied, March 30, 1982)

APPENDIX TO JURISDICTIONAL STATEMENT

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ARIZONA STATE PERSONNEL BOARD

LAWRENCE J. EVANS, JR., Appellant, vs. ARIZONA CORPORATION COMMISSION, Respondent.	FINDINGS OF FACT ORDER AND RECOMMENDATION

The above-captioned matter came on for hearing at 9:30 o'clock a.m. on October 19, 1977, at the law offices of WARREN G. LEVENBAUM, Hearing Officer, 111 West Monroe Street, Suite 1411, Arizona Title Building, Phoenix, Arizona 85003.

The Appellant appeared through counsel, Robert Corbin, and announced he was ready to proceed.

Stephen K. Smith, Assistant Attorney General, made an appearance in behalf of the Respondent and submitted a Motion To Continue dated October 19, 1977. The attorney of record, Robert Murphy of Murphy & Storey, P.A., 101 North First Avenue, Suite 2400, Phoenix, Arizona, did not appear. The Respondent announced that it was not ready to proceed.

FINDINGS OF FACT:

1. Stephen K. Smith, Assistant Attorney General, appeared sua sponte as an attorney not of record in behalf of the Respondent to urge a Motion To Continue a hearing in the cause.

2. Stephen K. Smith argued as grounds for his Motion To Continue those matters outlined in his written Motion To Continue dated October 19, 1977 and made a part of the Record hereof. Said Motion To Continue relates as cause thereof that a possible conflict of interest would exist which would prevent the Office of the Attorney General from providing representation to the Corporation Commission. This particular conflict would involve the possibility that one or more attorneys of the Office of the Attorney General would be potential witnesses in the matter.

3. The Motion To Continue was denied for the reason that

private counsel, Robert Murphy, was already the attorney of record, having been the attorney of record for many months since the Appeal was requested. Therefore, the matter of the possible conflict was treated as a moot issue.

The Motion To Continue was denied for the reason that counsel in behalf of the Attorney General lacked the standing to originate the Motion To Continue for the reason that he was not the attorney of record.

4. Mr. Robert Murphy, private counsel and specially appointed Assistant Attorney General to handle the case did not appear in person nor did he move to continue the hearing. Furthermore, no motion or stipulation for withdrawal of counsel was tendered by Mr. Robert Murphy as a reason for delaying the hearing.

5. The Appellant had filed his Notice of Appeal on July 14, 1976 and the matter was subsequently set for hearing and continued on August 9, 1976; August 19, 1976; September 28, 1976; March 23, 1977; April 21, 1977; June 7, 1977; August 9, 1977 and October 10, 1977.

6. The above referenced continuances were granted for one reason or another, either upon stipulation of respective counsel or motion of either counsel. On one occasion only, October 10, 1977, the case was continued due to a conflict in the hearing officer's schedule.

ORDER & RECOMMENDATION:

IT IS HEREBY ORDERED AND RECOMMENDED that Appellant's appeal be sustained as and for the reason that the Respondent was not able or willing to proceed with its case on the date set for hearing, October 19, 1977.

IT IS FURTHER ORDERED AND RECOMMENDED that the Appellant be reinstated in his capacity as a Hearing Officer for the Corporation Commission, retroactive to his date of discharge and that he be granted all retroactive benefits, privileges and remuneration of employment consistent with this Order and Recommendation.

/s/ Warren G. Levenbaum

WARREN G. LEVENBAUM
Hearing Officer

STATE OF ARIZONA
DEPARTMENT OF ADMINISTRATION
PERSONNEL BOARD

LAWRENCE J. EVANS, JR., Appellant, vs. ARIZONA CORPORATION COMMISSION, Respondent.	) REPORT INCLUDING) FINDINGS OF FACT) CONCLUSIONS OF) LAW, RECOMMENDA-) TION & REASONS FOR) THE DECISION

HEARING OFFICER: Ellis M. Kopp

APPEARANCES AS OF THE DATE OF THIS REPORT:

Appellant is represented by his attorney, John W. Acer. Respondent is represented by its attorney, Shirley H. Frondorf of the Firm of Linzer, Lebowitz & Frondorf.

HEARING DATED: August 2, 14, 16, 18, & 22, 1978, & September 7, 8, 21, 1978.

STATUTORY AND REGULATORY TIME LIMITS: Waived. Report to and Decision by Board within a reasonable time.

HISTORY

This Appeal was initially assigned to Hearing Officer Warren G. Levenbaum on August 9, 1976. He was replaced by Ellis M. Kopp on July 24, 1978. A record of the proceedings in the matter from 8/19/76 to 7/24/78 has been compiled and placed in the file by the present Hearing Officer. Suffice it to report that here during said period no testimony was received and nothing occurred which has any bearing on the decision hereinafter made.

Because there were numerous changes in the representation by both parties during the progress of this Appeal, a

recitation of those changes here will probably avoid confusion later.

Appearances for the Appellant:

William P. Mahoney, Jr., of the Firm of Sullivan, Mahoney & Tang represented Appellant from the inception of the Appeal until some time prior to 2/28/1977.

Robert K. Corbin, P.C., notified the Personnel Division on 2/28/77 that he had been substituted for Mr. Mahoney.

John W. Acer became associated with Mr. Corbin in this Appeal in July, 1978.

Robert K. Corbin withdrew as counsel for Appellant on 12/19/78.

Appearances for the Respondent:

Robert P. Murphy represented Respondent as Special Counsel until October, 1977.

Stephen K. Smith, Assistant Attorney General, acting for The Attorney General, Bruce E. Babbitt and later John A. La Soto, Jr., represented Respondent until 1/8/79.

Shirley H. Frondorf for the Firm of Linzer, Lebowitz & Frondorf became Special Counsel for the Respondent on 1/8/79 because Robert K. Corbin, formerly attorney for Appellant, had become Attorney General of the State of Arizona.

REPORT

After the testimony of three witnesses had been received, the Respondent moved to invoke Rule 2-5-33.8. There being no objection, the motion was granted and the hearing from then to conclusion was conducted in accordance therewith.

Appellant was employed on 9/1/72 by Respondent as a Hearing Officer. Some time prior to July, 1974, he became Chief Hearing Officer. On October 30, 1975, Evo J. DeConcini, Executive Secretary of Respondent, wrote a letter

(Exh 2) to Appellant informing him that he was no longer to have supervisory duties, that his duties were to be the same as Hearing Officer David Kennedy, that all directives theretofore issued by Appellant concerning the conduct of Hearing Officers and forms of orders were cancelled, that all assignments of, and directives to, Hearing Officers would be made by the Executive Secretary or his designee and that Appellant was to cease using the title, "Chief Hearing Officer". The letter clearly indicated that this change in the scope of Appellant's duties was to accomplish some diversity in procedures and that although the scope of his duties were revised there was to be no reduction in his salary. There was no indication or inference that this action was caused by any dissatisfaction with Appellant's performance of his duties.

The transcript will reveal that Respondent introduced testimony to indicate that the changes in Appellant's responsibilities, duties and title were the result of dissatisfaction with his performance of those duties prior to 10/30/75. Neither Evo J. DeConcini, the writer of the letter, nor the Commissioners whose thinking was reported in the letter, were called to explain, amplify or amend the letter and no reason was offered for their non-appearance. Therefore, the letter is accepted as written and any testimony concerning dissatisfaction with Appellant's performance as Chief Hearing Officer prior to 10/30/75 is now held to be irrelevant and any such evidence will not be considered or discussed herein.

Also, Appellant did not initiate any grievance or appellate procedures with respect to the diminution of his duties or the reduction of his status from Chief Hearing Officer to Hearing Officer, and, therefore, the propriety of that action by Respondent is not at issue in this appeal. Any evidence bearing on the propriety thereof is not relevant to the issues

in this appeal and will not be discussed or considered herein.

On 6/21/76 Executive Secretary Donald E. Vance wrote a letter to Appellant dismissing him from state service, effective immediately, for the reasons (1) Willful disobedience; (2) Insubordination and (3) Improper Attitude evidenced by six specific reasons. This letter, hereinafter called the "Dismissal Letter" is part of the record herein. It was marked as Exh. 7.

On 7/14/76 Appellant by his attorney, William P. Mahoney, Jr., filed a Notice of Appeal which patently failed to satisfy the provisions of Rule 5-2-33.B.1. On 3/18/77 Respondent filed a Motion to dismiss the Appeal because Appellant's Notice of Appeal was defective and Appellant responded by filing an Amended Appeal. No decision respecting this matter was ever made by Hearing Officer Levenbaum. On 8/2/78 this Hearing Officer pointed out to the parties that the Amended Appeal also failed to meet the Rule's requirements and it was agreed that Appellant's Appeal would be considered to be a general denial of the reasons for dismissal (Tr I pgs 6 to 8).

The clear issue in the appeal is that Respondent dismissed Appellant from his position in state service for the reasons set forth in the Dismissal Letter and the Appellant denies that the reasons occurred or if any of them did occur, that it constituted willful disobedience, insurbordination or improper attitude under ARS 41-770.

Before considering the evidence adduced respecting each of the six specific reasons, I call your attention to Respondent's opening statement by which it explained the charges against Appellant (Tr I pages 49-56). In reading this opening statement it should be remembered that nothing said in it can broaden the scope of the Dismissal Letter nor may

anything said be considered to have any evidentiary value. So in the final analysis it is each specific reason as set forth in the Dismissal Letter which must be proven by a preponderance of the evidence.

As is too often the case this Dismissal Letter is not written with the preciseness one desires in a document alleging charges against an employee. Here the specific reasons are so vague and indefinite as to render it very difficult to be certain what exactly it is that Appellant did that Respondent deems to have been willful disobedience, insubordination or improper attitude. Be that as it may Respondent is obliged to prove by a preponderance of the evidence that ARS 41-770 was violated in the manner set forth in the Dismissal Letter.

Let us proceed now to a careful consideration of the evidence adduced in this Appeal as it pertains to each of the specific reasons for dismissal as stated in the Dismissal Letter.

REASON 1

(1) THAT YOU WERE INFORMED IN A MEETING AND BY LETTER IN OCTOBER OF 1975 THAT YOU WERE TO CEASE USING THE TITLE OF CHIEF HEARING OFFICER AND THAT YOUR RESPONSIBILITIES TO THE COMMISSION DID NOT INCLUDE ANY SUPERVISORY AUTHORITY OVER ANY OTHER HEARING OFFICER IN THE COMMISSION.

(a) THAT YOU REFUSED TO COMPLY WITH THE ABOVE, HAVE CRITICIZED THE COMMISSIONERS AND DENIED THEIR MANAGEMENT PEROGATIVES (SIC) IN MAKING SUCH A DECISION, AND HAVE IN FACT INFORMED THE SCREENING COMMITTEE FOR A MUNICIPAL POSITION THAT YOU WERE IN FACT CHIEF HEARING OFFICER RESPONSIBLE FOR THE SUPERVISION OF TWO HEARING OFFICERS IN PHOENIX AND "ONE ILLEGAL HEARING OFFICER IN TUCSON" (THE QUOTE BEING YOUR LANGUAGE).

The evidence introduced by Respondent to support the

foregoing reason is to be found in the testimony of Donald E. Vance, Sheryl Kanaga and Rodger Golston.

An examination of Mr. Vance's testimony reveals that when he became Executive Secretary of Respondent he felt that his primary function was the reorganization of the Security Division, that right or wrong, that was his most important function. (Tr I pgs 64 & 110). It is evident from his further testimony that he wanted to rid himself of any details concerning the Hearing Division as quickly as possible. But one of the problems, which he had inherited, was Appellant's desire to have his position as Hearing Officer explicitly clarified. Vance's belief that Appellant insisted upon retaining his supervisory authority over the Hearing Officers is based upon Exh. 4 which is a Memo to Vance from Appellant in response to Exh. 3. In Exh. 4 Appellant uses the title Chief Hearing Officer and refers to the two hearing officers as "my Hearing Officers". Later on cross-examination Mr. Vance admitted that this and other memos passing between Appellant and him were written for the purpose of clarification of who had what duties (Tr 1 pgs 140 & 141). Appellant confirms this. (Tr V pg 146A).

Additionally, Mr. Vance testified that he concluded from his conversation with Appellant, that Appellant just could not accept the reduction of his duties and that he continued to complain about it.

The only other evidence that supports the charge that Appellant used the title of Chief Hearing Officer is contained in Mr. Vance's testimony concerning a telephone call from Rodger Golston in which Mr. Golston told Mr. Vance that Appellant had made a remark that he was the Chief Hearing Officer of Respondent and that there was an illegal hearing officer in Tucson. Mr. Vance testified that in this conversation

he told Mr. Golston that Appellant's ability is high and "everything I have heard or seen of his ability was exemplotory (sic)" (Tr I pg 70). On cross-examination Mr. Vance said he further explained to Mr. Golston that he did not believe that Appellant misrepresented himself because he believed he was still Chief Hearing Officer and the Personnel Division still carried him in that classification and under that title. (Tr I pgs 112 to 114).

Mr. Golston testified that in June, 1976, he was Chief Presiding Judge of the Phoenix Municipal Court and in that capacity he was Chairman of the committee that reviewed application for new judges, that the Committee interviewed Appellant who had filed an application for Municipal Judge; that Appellant told the Committee that he was the Chief Hearing Officer of the Corporation Commission and that his supervisory responsibilities consisted of supervision of two Hearing Officers in Phoenix and a Hearing Officer in Tucson who was half-time and illegal; that Appellant said he was still Chief Hearing Officer; that he did not know if Appellant's written application stated that he was the Chief Hearing Officer and that the application was lost; and that he was told by someone that Appellant was no longer Chief Hearing Officer and that Appellant had been told not to use the title (Tr II pgs 38-41).

On cross-examination Mr. Golston testified that this information and "some stories" were told to him by Stuart Schoenberg, a Hearing Officer for Respondent and a part-time City Magistrate; that he believes he asked Appellant "whether he had the right to use that title and I think he said he did".

Appellant testified concerning his interview by Judge Golston (Tr V pgs 173 to 178). He said that he told Judge

Golston "Yes. I am the Chief Hearing Officer of the Corporation Commission. However, I am not allowed to utilize the title or to exercise my supervisory duties and responsibilities." He further testified that two of the Commissioners, for whatever reason, had made that decision and that probably as long as they were in office that decision would remain in effect. Finally Appellant testified that he was asked and answered as follows:

> "Q. How many people do you actually or did you actually supervise as Chief Hearing Officer?
>
> A. Two people, Two Hearing Officers in Phoenix and one illegal Hearing Officer in Tucson."

Appellant then explained his view of the law pertaining to hearing officers and because of that view he then considered that when Evo DeConcini acted as a hearing officer in Tucson, that he was an illegal hearing officer.

Whether or not, in every case heard by DeConcini, he was acting illegally or legally was not proven. Suffice it to say that Appellant's use of the term "illegal" was tasteless and unnecessary under the circumstances.

Appellant's statement that he was Chief Hearing Officer was not untrue. The proofs are that the Personnel Division carried Appellant's title on its records as Chief Hearing Officer until the day after Appellant's dismissal. A truthful answer, therefore, to the question, "What is your position with the Arizona Corporation Commission?" must be, "Chief Hearing Officer." He was simply, properly and accurately reporting a fact - a fact that Respondent neglected to legally alter. That the records of the Personnel Division remained unchanged until the day after Appellant's dismissal was proven and clearly explained by Respondent's witness, Sheryl Kanaga, (Tr II pgs 25 & 26). Also, Respondent stipulated (Tr III pg 5) that Appellant was paid the salary fixed

for the Chief Hearing Officer and that he continued to be carried for official Personnel Division purposes as Chief Hearing Officer until his dismissal.

Sheryl Kanaga also testified that when she interviewed Appellant, he told her that he was prohibited from using the title of Chief Hearing Officer and from exercising his supervisory authority. (Tr I pgs 165 to 167) Exh. 10)

Additionally, the parties stipulated (Tr III pg 6) that after Appellant received the letter of 10/30/75 (Exh. 2) the records of Respondent do not reveal any document, except Exh. 4, wherein Appellant used the title Chief Hearing Officer.

Appellant's witness, David Kennedy, testified that to his knowledge, Appellant did not use the title of Chief Hearing Officer or act in that capacity after October, 1975. (Tr III pgs 89 & 90)

Respondent, itself, wasn't very concerned about its use of the title because it continued to use stationery from October, 1975, to some date in January, 1976, with Appellant's name and title as Chief Hearing Officer printed thereon. (Tr V pg 36 and Exhs. L & M)

With respect to the charge that Appellant refused to comply with the order to refrain from exercising his supervisory authority over the Hearing Officers, Mr. Vance testified that Appellant did not perform any of the duties prohibited by the letter of 10/30/75 after that date. (Tr I pgs 155 & 156) David Kenndey clearly and completely describes that Appellant discontinued the performance of any supervisory functions from October, 1975, to the date of his dismissal. (Tr V pgs 36 to 38)

Needless to say Appellant testified that he didn't exercise any supervisory authority after receiving the letter of

10/30/75. (Tr V pgs 136 to 140)

The preponderance of the evidence abundantly establishes that Respondent has failed to prove Reason No. 1.

REASON 2

(2) THAT YOU HAVE CRITICIZED THE COMMISSIONERS, IMPUGNED THEIR INTEGRITY, MADE REFERENCE TO SO-CALLED INSIDE INFORMATION IN REFERENCE TO GRAND JURY INDICTMENT, AND SUGGESTED IMPROPRIETY IN THEIR METHOD OF ADMINISTERING THE COMMISSION, AND MOST PARTICULARLY, IN THEIR HIRING PROCEDURES.

This nebulous reason for dismissal is most difficult to understand and particularly to relate to the statutory charges of willful disobedience, insubordination or improper attitude.

Respondent's evidence in support of this conglomeration of words and phrases rests entirely upon the testimony of two witnesses-principally upon the testimony of Mr. Vance-the author of the Dismissal Letter. Interestingly enough, Mr. Vance stated that he was not a memo writer and complained that Appellant was always "legally picking apart every memo that I was writing." May I suggest that Mr. Vance's letter writing also left something to be desired.

Mr. Vance's testimony concerning this reason must be read to be understood and it will be found in the Transcript at Tr I pgs 42 to 157. With respect to this reason it became obvious that the Commissioners ought to have been called to testify as to what they actually heard from Mr. Vance and what they said to him (Tr I pg 89). For some unexplained reason Respondent chose not to call them or any of them.

We have only Mr. Vance's statements that Appellant criticized the Commissioners; that Appellant said there was a conspiracy between two of the Commissioners against him; that Appellant made reference to information that he had which

he might use against the Commissioners if they didn't desist from reclassifying him; that he said these same things to other employees. He named four employees whom he said reported to him that Appellant had made these same types of comments to them. Not one of these employees was called by Respondent to confirm this testimony of Mr. Vance. Marvin Spahr was called by Appellant. His statement was introduced in evidence Exh 11 and his affidavit respecting the same (Exh F) was also introduced in evidence. The evidence produced by these documents and the testimony of Mr. Spahr (Tr III pgs 28 to 73), viewed in its most helpful light is not very supportive of Respondent's position.

We have the testimony of two witnesses who cast doubt upon the weight to be accorded to the testimony of Mr. Vance.

Respondent's witness, Andrew M. Bettwy, the present Chief Hearing Officer for Respondent, testified as follows: (Tr VIII pgs 54 & 55) that he knew Don Vance well enough to have an opinion of his truth and veracity, that Don had the gift of gab, that Don "could tell a story that would make you wonder if you were at the same place that he was when the event occurred."

Appellant's witness, David Kennedy, testified that "Don has been described, and I think somewhat accurately, he is a great bullshit artist".

I was impressed with the testimony of these two witnesses and am, therefore, inclined to be a little doubtful of the unsupported testimony of Mr. Vance. This doubt is increased by the failure of Respondent to call those witnesses who might have corroborated Vance's testimony.

More importantly, however, is the failure of Respondent to show that the criticism by Appellant constituted willful

disobedience, insubordination or improper attitude, or how the Commissioner's integrity was impugned, or why his reference to inside information in reference to Grand Jury indictment was any violation of ARS 41-770. Finally the testimony of Messrs. Kennedy and Evans and others indicate that there was impropriety on the part of the Commissioners in their method of administering the Commission and most particularly in their hiring Stuart Schoenberg and the unusual preferential treatment accorded him.

The evidence offered in support of Reason 2 does not justify a conclusion that ARS 41-770 was violated by any act of Appellant.

REASON 3

(3) THAT YOU HAVE CRITICIZED THE INTEGRITY OF OTHER HEARING OFFICERS AT THE COMMISSION, BUT HAVE NOT SEEN FIT TO FILE ANY OFFICIAL CHARGES.

Respondent waived this reason and offered no proof to support it (Tr II pg 47 & Tr III pg 99). No reason for waiving this was given by Respondent.

REASON 4

(4) THAT YOU HAVE DISCUSSED COMMISSION BUSINESS WITH OUTSIDE PARTIES OTHER THAN LEGAL COUNSEL.

No reference is made to any order, rule or statute prohibiting the discussion of Commission business with outside parties. It is simply assumed that such discussion is prohibited and, therefore, if it occurs it is wrong. An examination of Respondent's Brief fails to reveal any legal basis for this reason. It is assumed that Respondent is not suggesting that it has the right to abridge an employee's right to free speech. (Art. 2, Sec 1, Ariz. Const.) The public's right to know about the business of Respondent under today's governmental

policy is very broad and any curtailment of that right must be very limited.

However, an examination of the testimony offered by Respondent reveals that Mr. Vance relied on Appellant's Memo (Exh 6) paragraph 6 in which Appellant states that he discussed the problem of eliminating the need for a chief hearing officer in Respondent's Hearing Division. Appellant himself describes fully the kind of Commission business he discussed with many people. (Tr V pgs 151 to 162) He admits that he told outside persons that he was unhappy in his present position. (Tr VI pg 33)

Nowhere is it stated that Appellant discussed the cases which he was hearing or which were pending in the Commission or that he revealed classified information to the public. The testimony reveals that he talked about how the Commission was being administered, its functions in handling the business of the State and how it fitted into the framework of State Government. He quite naturally thought that a hearing division ought to be supervised by a chief. He quite properly felt that such a division would function best if a knowledgeable hearing officer supervised the training and functioning of hearing officers. Certainly, every voter in the State had a right to hear an informed person expound his theories and thought on this subject so that they could intelligently vote for or against commissioners seeking election to the Arizona Corporation Commission.

To hold that Respondent has the right to terminate the employment of any of its employees because they publicly differ with some phase of the Commissioner's administrative policy or method is to subvert the foundations of government. Respondent does not have that right and its termination of Appellant's employment for Reason 4 was arbitrary, capricious and unlawful.

REASON 5

(5) THAT YOU HAVE MADE A JUDGMENT VALUATION THAT THE COMMISSIONERS DO NOT HAVE THE RIGHT TO ESTABLISH JOB RESPONSIBILITY AND THAT THE EXECUTIVE SECRETARY DOES NOT HAVE THE RIGHT TO ASSIGN ANYONE OF THEIR (sic) CHOICE TO ADMINISTER THE HEARING DIVISION REGARDLESS OF HIS AGE.

Suffice it to say that the evidence received pertaining to this reason clearly proves that Appellant very definitely made a judgment valuation that the Commissioners made an unwise establishment of job responsibility and that the Executive Secretary made an unwise decision to appoint a young, untrained person with no legal background or any previous experience with hearing divisions to be the administrative head of the Hearing Division. Appellant, however, did not deny the right of the Commissioners or the Executive Secretary to make these bad decisions. (Tr V pgs 147 to 150 & 179 & 180)

Reason 5 is not supported by the evidence.

REASON 6

(6) THAT DUE TO YOUR OPINION THAT YOU HAVE BEEN PERSONALLY MISUSED, YOUR NEGATIVE ATTITUDE IS REFLECTING ON OTHER EMPLOYEES IN THE COMMISSION AND TO THAT DEGREE AFFECTING YOUR EFFICIENCY AS A HEARING OFFICER.

This is a surprising charge. It is the only time that it is suggested that Appellant was anything but an efficient and capable hearing officer. The author of Reason 6 testified that he told Mr. Golston "everything that I have heard or seen of his ability as a hearing officer was exempletory" (exemplary). (Tr I pg 70) This conversation took place only a short while before Mr. Vance wrote the Dismissal Letter.

In addition Appellant's attorney asked Mr. Kennedy if he

had observed Appellant conducting hearings and upon receiving an affirmative answer the following occurred:

"Q. How do you describe his abilities as a hearing officer?
Mr. Smith: I will object, Your Honor. This is not relevant to any issues before us.
Hearing Officer: The proof is quite contrary.
Mr. Corbin: You're absolutely correct. I'm sorry, Your Honor.

The foregoing clearly indicates that Respondent not only didn't prove that Appellant's efficiency as a Hearing Officer was affected, but by that objection to the introduction of proof as to his efficiency, completely removed Reason 6 as an issue in this Appeal.

Both parties filed Briefs and Proposed Findings of Fact, Conclusions of Law and Recommendations. Rule R2-5-33. B.11 requires the Hearing Officer and the Board to "include a ruling upon each such finding proposed by the appellant and respondent." Said Briefs and Proposed Findings, etc. are made a part of the record herein. In accordance with the above cited Rule I make the following rulings respecting said proposed findings of fact and recommend to the Board that it adopt them as its ruling thereon. Said Rule does not require specific rulings on the proposed conclusions of law and recommendations. The Findings of Fact, Conclusions of Law and Recommendations made by me and hereinafter set forth constitute my rulings thereon.

AS TO RESPONDENT'S FINDINGS

1. Findings 1, 2, 3, 4, & 5 pertain to the period prior to 10/30/75 and are rejected because they are irrelevant as held in this Report (supra).

2. Findings 6, 9, 11, 12, 13, & 14 are rejected because the evidence does not justify them as worded.

3. Findings 7, 8, 10, 15, & 16 are in substance included in this Report.

AS TO APPELLANT'S FINDINGS

1. Findings as to Allegations 1 to 6, inclusive are not adopted but the substance thereof when relevant is included in this Report.

FINDINGS OF FACT

In addition to the facts set forth in the body of this Report I find that the evidence justifies the following:

1. That the Respondent has failed to prove by a preponderance of the evidence the existence or validity of any of the six reasons for dismissing Appellant from state service as stated in the Dismissal Letter.

2. That the evidence did not establish that Appellant was guilty of willful disobedience, insubordination or had an improper attitude.

CONCLUSION OF LAW

That Appellant did not violate the provisions of ARS 41-770A. 4.6 14 and, therefore should not have been dismissed by Respondent.

RECOMMENDATIONS

It is recommended that Lawrence J. Evans, Jr. be restored to the exact same position he held at the moment of his dismissal, with full back pay and any increments he would normally have received since his dismissal. At the time of his dismissal he held the position of Chief Hearing Officer for the Arizona Corporation Commission as altered by the Letter dated 10/30/75 which reduced the said position to the position held on that day by Hearing Officer David Kennedy, which position thus reduced was in the process of being reclassified and was reclassified on 6/22/76 to that of Hearing Officer III, Class Code 74562, Grade 22, which is the position

Appellant would have held had he not been terminated on 6/21/76. This, therefore, is the position he should hold from 6/22/76.

REASONS FOR THE DECISION

I believe that the reasons for the recommended decision in this appeal are sufficiently set forth in the Report and, therefore, any further words are unnecessary.

Respectfully submitted,

Dated: January 31, 1979.

/s/ Ellis M. Kopp

Ellis M. Kopp, Hearing Officer

(Letterhead of the Arizona State Personnel Board)

April 11, 1979

Mr. Lawrence J. Evans, Jr.
539 East Erie Drive
Tempe, Az 85282

Dear Mr. Evans:

The Arizona State Personnel Board at its meeting reviewed the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation in the matter of your appeal against your dismissal from the Arizona Corporation Commission.

Enclosed please find a copy of the Board's decision denying your appeal.

You may appeal this decision to the Superior Court of Maricopa County provided the appeal is made within thirty days after the date of this letter, on one or more of the following grounds that the order was:

1. Founded on or contained error of law which shall specifically include error of construction or application of any pertinent rules.
2. Unsupported by any evidence as disclosed by the entire record.
3. Materially affected by unlawful procedure.
4. Based on violation of any constitutional provision.
5. Arbitrary or capricious.

The grounds should be stated in a written notice of appeal filed with the court, with copies served on the Board and on the employing agency.

Sincerely,

/s/ Richard Rabago

Richard Rabago

Enclosure

cc: Mr. John W. Acer, Attorney

STATE OF ARIZONA
DEPARTMENT OF ADMINISTRATION
PERSONNEL BOARD

LAWRENCE J. EVANS, JR., Appellant, vs. ARIZONA CORPORATION COMMISSION, Respondent.	DECISION AND ORDER OF THE ARIZONA STATE PERSONNEL BOARD

The Personnel Board has reviewed the transcript of testimony, exhibits and all other documents submitted in this case and concludes that it must disagree with the report of the Hearing Officer in certain respects. The Board adopts said report except insofar as it is inconsistent with this decision and order and is specifically rejected hereby.

FINDINGS OF FACT

The Board finds that the evidence justifies the following:

1. That the testimony of Donald E. Vance and Rodger Golston together with Exhibit 4 establishes that Appellant continued to use the title, "Chief Hearing Officer" in defiance of the written direction by Respondent that he discontinue its use.

2. That Appellant asserted that he was responsible for the supervision of two Hearing Officers in Phoenix and one illegal Hearing Officer in Tucson and in papers filed by Appellant subsequent to the hearing he has continued to argue that the Hearing Officer in Tucson is illegal, thus criticizing the Commissioners in the performance of their management prerogatives.

3. That Appellant, in his conversations with Mr. Vance, criticized the Commissioners, impugned their integrity and

suggested that he had inside information concerning the Commissioners which might be presented to a grand jury if he was not permitted to continue as Chief Hearing Officer. There is no basis for doubting the truthfulness of Mr. Vance's testimony in this instance.

4. That Appellant, by his own admission discussed Commission business with outside parties other than legal counsel.

5. That Appellant was and is of the firm opinion that he has personally been misused by the Commission. His constant expression of this opinion to fellow employees has had a disrupting affect upon them. To the extent of that disruption his efficiency as a Hearing Officer has been diminished. By way of clarification a Hearing Officer who conducts his hearings and writes his reports with a high degree of efficiency can become almost useless by allowing his feelings of abuse and misuse to so affect his attitude and conduct that he disrupts fellow employees and superiors to the point that the overall function of his employer is disturbed and diminished. In that respect his efficiency as a Hearing Officer is lessened.

CONCLUSIONS OF LAW

1. That Appellant's continued use of the title, "Chief Hearing Officer" and his statements that he had Hearing Officers under his supervision after he had been specifically directed not to use said title and after he had been informed that he no longer had any supervisory authority over any Hearing Officer constituted wilful disobedience under A.R.S. 41-770.

2. That Appellant's continued reference to the illegal Hearing Officer in Tucson, his continued criticism of the Commissioners and his apparent threat to present his inside information to a grand jury unless those Commissioners continued him as a Chief Hearing Officer constituted insubordination under A.R.S. 41-770.

3. That Appellant's discussion of Commission business with outside parties and his actions and talk within the Commission resulting from his belief that he was being misused constituted an improper attitude under A.R.S. 41-770.

4. That Appellant's conduct as an employee of Respondent, as above described, justified Respondent, under the law, to dismiss him.

ORDER OF THE ARIZONA STATE PERSONNEL BOARD

THAT the appeal be denied.

/s/ Mimi Morron
MIMI MORRON, Chairwoman
Arizona State Personnel Board

DATED this 11th day of April, 1979

August 1978

PERSONNEL BOARD MEMBERS:

Mary Morron, Chairwoman
7740 East Seneca
Tucson, AZ 85715

Leon Cherry (Dept. of Revenue)
1230 East Jefferson
Phoenix, AZ 85034

Douglas J. Kennedy
Vice President
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Tom Facio
4834 East Paiute Street
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General Frank Sackton
7814 East Northland Drive
Scottsdale, AZ 85251

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

In the Matter of LAWRENCE J. EVANS, JR., Appellant, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Respondents.	No. C-386611 MEMORANDUM OPINION AND ORDER

The Appellant was dismissed from his employment by the Arizona Corporation Commission. He appealed his dismissal to the Arizona State Personnel Board. A lengthy hearing was held before a hearing officer. In disregard of the hearing officer's recommendations, the board denied the appeal. This appeal followed. For the reasons hereinafter stated, the ruling of the Arizona State Personnel Board is reversed.

The reasons given by the Commission for dismissing appellant were (1) willful disobedience, (2) insubordination and (3) improper attitude. The board held that each of these reasons had been established by the evidence presented to it. Each will be discussed separately below.

THE CHARGE OF WILLFUL DISOBEDIENCE

The appellant held the job title of Corporation Commission Chief Hearing Officer. His duties included acting as a hearing officer for the Commission and being responsible for assigning, supervising and evaluating the work of a staff of

hearing officers. On October 30, 1975, he was informed by the executive secretary of the Commission that he was relieved of all supervisory duties and that he was to cease using the title chief hearing officer. His salary was to remain at its present level. While it was contemplated that his job description would be revised, at the time of his dismissal on June 21, 1976, no such revision had ever been effectuated and he was still carried on the records of the Department of Administration as chief hearing officer.

The letter of dismissal informed appellant that "...by letter in October of 1975 that you were to cease using the title of Chief Hearing Officer and...you have refused to comply with the above...and have in fact informed the Screening Committee for a Municipal position that you were in fact chief hearing officer responsible for the supervision of two hearing officers...." At the appeal hearing before the Board, evidence was also presented that on June 4, 1976, the appellant wrote a memorandum to the executive secretary of the Commission in which the appellant described himself as chief hearing officer. If he used that title at any other time after October 30, 1975, there was no evidence of it. The board found as a fact that "Appellant continued to use the title, 'Chief Hearing Officer' in defiance of the written direction by Respondent that he discontinue its use." and it concluded that his "continued use of the title...and his statement that he had Hearing Officers under his supervision after he had been specifically directed not to" constituted willful disobedience.

The evidence does not support the finding that appellant's two uses of "chief hearing officer" were "in defiance" of written directions. "Defiance" is a contemptuous opposition or disregard openly expressed in words or action. State v.

Mohar, 13 P.2d 454 (1932). The appellant had applied to be employed as a magistrate by the City of Phoenix and had appeared before a screening committee. He had informed the committee that he was a chief hearing officer and that he had supervision over other hearing officers. In point of fact, he was a chief hearing officer. If the screening committee had made inquiry it would have learned that that was his job title. To inform the screening committee that he had supervision over other hearing officers can be considered as puffing but hardly as defiance.

Appellant has not raised the point that the reference to himself as "Chief Hearing Officer" in his memorandum of June 4, 1976, to the Commission's executive secretary was not specified as a reason for his dismissal.[1] However, this event cannot reasonably be characterized as willful disobedience, when it is the only time in more than seven months that he even used the title in connection with his employment.

THE CHARGE OF INSUBORDINATION

The Board concluded "that Appellant's continued reference to the illegal Hearing Officer, his continued criticism of the Commissioners and his apparent threat to present his inside information to a grand jury unless those Commissioners continued him as Chief Hearing Officer constituted insubordination...."

Again, Appellant has made no issue of the fact that his letter of dismissal did not specify as a reason for dismissal that he had threatened to present inside information to a

1. When an employee is dismissed from the State Service, he must "be furnished with specified charges in writing when the action is taken." A.R.S. §41-785A

grand jury unless he was continued as chief hearing officer.[2]

The Board's conclusions indicate a complete ignorance of the meaning of "insubordination." The term imports a willful disregard of express of implied directions of the employer and a refusal to obey reasonable orders. School District Number 8, Pinal County v. Superior Court, 102 Ariz. 478, 433 P.2d 28 (1967) The terms "insubordination" and "willful disobedience" overlap. The latter connotes a specific violation or command or prohibition while the former implies a general course of contumacious conduct. Coomes v. State Personnel Board, 30 Cal. Rptr. 639 (Cal. App., 1963) None of the acts characterized as insubordination involved a refusal by Appellant to obey orders.

THE CHARGE OF IMPROPER ATTITUDE

Among the Board's findings of fact were the following:

"3. That Appellant, in his conversations with Mr. Vance, criticized the Commissioners, impugned their integrity and suggested that he had inside information concerning the Commissioners which might be presented to a grand jury if he was not permitted to continue as Chief Hearing Officer....

"4. That Appellant, by his own admission, discussed Commission business with outside parties other than legal counsel.

"5. That Appellant was and is of the firm opinion that he has personally been misused by the Commission. His constant expression of this opinion to fellow employees has had a disrupting effect upon them...."

The Board concluded "That Appellant's discussion of Commission business with outside parties and his actions and

2. The letter of dismissal simply charged that Appellant had "made reference to so called inside information in reference to Grand Jury indictment."

talk within the Commission resulting from his belief that he was being misused constituted an improper attitude under A.R.S. §41-770."

But what does "improper attitude" mean? A statute must be definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution. Hernandez v. Frohmiller, 68 Ariz. 242, 204 P.2d 854 (1949).

> "...(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co. 268 U.S. 385, 391, 46 Sup. Ct. 126, 127, 70 Law Ed. 322, quoted with approval in Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 413, 291 P.2d 764 (1955)

"Improper attitude" is an amorphous term which can mean different things to different persons. This is clearly demonstrated by the manner in which the Board has applied the term in this case.

The Board held that discussing Commission business with outside parties indicated an improper attitude. But what is meant by "discussed Commission business with outside parties"?

The Appellant freely admitted that he had discussed with other persons his problems with the Commission involving his being relieved of his supervisory duties and being instructed not to use the title chief hearing officer. He also freely admitted that he had from time to time "briefed" persons, including candidates for the office of corporation commissioner, on the organization and functions of the commission. He had also discussed with other persons his objections to the employment of a part-time hearing officer for political purposes. It is questionable that any of these topics

of discussion constituted "business of the Commission."

Broadly speaking, the business of the Corporation Commission is to regulate public service corporations, to regulate the sale of securities, to issue certificates of incorporation to companies organized under the laws of Arizona and to issue licenses to foreign corporations to do business in Arizona. There is absolutely no evidence that appellant ever discussed with outside persons anything relating to any matter pending before the Commission in relation to these functions.

The finding that appellant's constant expression that "he has personally been misused by the commission...has had a disrupting effect upon (fellow employees)" is also difficult to pin down. A number of witnesses testified that appellant had discussed with them many of his complaints. However, none testified that these complaints had had a disrupting effect upon other employees. Most agreed that appellant was not saying anything that other commission employees were not also saying.

Much of the evidence presented at the hearing before the Board involved problems created by the Commission's hiring a part-time hearing officer who had previously been a legislator and an active member of his political party. This part-time hearing officer was employed at a time before appellant had been instructed not to exercise supervisory authority over hearing officers. There was considerable evidence, none of which was contradicted, that when the part-time hearing officer did not want to hear a case assigned to him or when he wanted to hear a case which was not assigned to him, he would go over appellant's head to members of the Commission to get what he wanted. In one case, he was successful in having assigned to himself for hearing a case in which there was a grave conflict of interest.

Appellant's outrage at this conduct cannot be dismissed simply as "empire building". So far as the politicians who were his superiors are concerned, his attitude may have been improper but did he have an improper attitude so far as the people of Arizona are concerned?

Clearly, the term "improper attitude" is too indefinite and uncertain to constitute a cause for dismissal.

DISPOSITION OF THE CASE

This Court "may affirm the order of the personnel board, remand the matter for further proceedings before the board, or reverse or modify the order." A.R.S. §41-785F

Attached to appellant's opening brief was a proposed form of judgment which would have required that he be reinstated to his former position as chief hearing officer, that he be paid full back pay including merit raises, that he be frozen into the merit system for a period equal to the number of months that he has been in a terminated status and that he be provided with the exact perquisites (sic) which he had previously enjoyed. This is more than he is entitled to receive.

Because he was wrongfully discharged, appellant is entitled to be reinstated to the position he held at the time he was dismissed, provided that position is still in existence. At the time of the dismissal, steps were underway to reclassify appellant's position. In part, the title "Chief Hearing Officer" would be eliminated and his job description would also no longer provide for the exercise of supervisory responsibilities. The job position would be described as Hearing Officer III. This change had not been effectuated at the time of appellant's dismissal but did take effect shortly thereafter.

However, at some later date, a new position of Chief Hearing Officer was created. It was also described as a Hearing Officer IV but it involved having supervisory responsibility.

While an employer may eliminate a position, it must do so in good faith.

When read superficially, the case of State Personnel Commission v. Webb, 18 Ariz. App. 69, 500 P.2d 329 (1972) would appear to hold that the Board is vested with discretion as to the amount of back pay which may be awarded to a reinstated employee. However, close reading of that case establishes that the Board's discretion exists only if, in fact, grounds for dismissal existed. In such cases the board has the authority to ameliorate an unduly harsh action taken by the employer. However, where the dismissal is completely unjustified, the reinstated employee is entitled to his back pay, less any amounts he may have earned since the time of his dismissal (which would not include his military retirement pay).

IT IS ORDERED reversing the order of the Arizona State Personnel Board denying appellant's appeal.

IT IS FURTHER ORDERED remanding this cause to the Arizona State Personnel Board for the purpose of determining the position to which appellant should be reinstated and the amount of back pay which he is entitled to receive.

IT IS FURTHER ORDERED that counsel for Appellant prepare a formal judgment and lodge it with this Court within ten days.

DATED this 31 day of July, 1979.

/s/ Charles L. Hardy
Judge of the Superior Court

Copies of the foregoing mailed to:
Mr. John W. Acer
Ms. Shirley H. Frondorf
Arizona State Personnel Board

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COURT OF MARICOPA

In the Matter of LAWRENCE J. EVANS, JR., Appellant, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Respondents.	No. C-386611 JUDGMENT

The appellant was dismissed from his employment by the Arizona Corporation Commission. He appealed his dismissal to the Arizona State Personnel Board. When his appeal was denied by the Board, appellant then appealed to this Court. The Court having determined that appellant was wrongfully dismissed, IT IS ORDERED as follows:

1. Reversing the order of the Arizona State Personnel Board denying appellant's appeal.

2. Remanding this cause to the Arizona State Personnel Board for the purpose of determining the position to which appellant should be reinstated and the amount of back pay which he is entitled to receive.

DATED this 29 day of August, 1979.

/s/ Charles L. Hardy
Judge of the Superior Court

Copies of the foregoing mailed to:
Mr. John W. Acer

Ms. Shirley H. Frondorf
Arizona State Personnel Board
Mr. Lawrence J. Evans, Jr.

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of LAWRENCE J. EVANS, JR., Appellant, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Respondents.	(Filed: Feb. 2, 1982) 1 CA-CIV 5099 DEPARTMENT B MARICOPA County Superior Court No. C-386611 ORDER

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the opinion be sent to each party appearing herein or the attorney for such party and to The Honorable B. Michael Dann, Judge.

DATED this 2nd day of February, 1982.

/s/ Eino M. Jacobson
EINO M. JACOBSON, PRESIDING JUDGE
Department B

The foregoing directives were complied with this 2nd day of February, 1982, by mailing the required to:

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The Honorable B. Michael Dann, Judge
Maricopa County Superior Court
East Court Building
101 West Jefferson Street
Phoenix, Arizona 85003

GLEN D. CLARK, CLERK
by
/s/ [name illegible]
Chief Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of LAWRENCE J. EVANS, JR., Appellant, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Respondents.	(Filed: Feb. 2, 1982) 1 CA-CIV 5099 DEPARTMENT B OPINION

An Appeal from the Superior Court of Maricopa County
Cause No. C-386611
The Honorable B. Michael Dann, Judge
REVERSED

Law Offices of Lawrence J. Evans, Jr. By Lawrence J. Evans, Jr.	Tempe
and	
John Acer Attorneys for Appellee	Phoenix
Lebowitz & Frondorf By Ronald Lebowitz Shirley H. Frondorf	Phoenix
and	
Mack T. Jones Attorneys for Appellants	Phoenix

W R E N, Chief Judge

Appellee, Lawrence J. Evans, Jr., brought this action to

challenge his discharge from his position as a Hearing officer for the Arizona Corporation Commission. The superior court reversed the Arizona State Personnel Board's (Personnel Board or Board) order of dismissal and held that the appellee was wrongfully dismissed from state service, remanding this matter to the Personnel Board for further action. We reverse the judgment of the superior court and reinstate the Personnel Board's decision of dismissal.

Appellee commenced work for the Arizona Corporation Commission as a hearing officer in September of 1972. Thereafter, in 1974, he became Chief Hearing Officer. On October 30, 1975, the executive secretary of the Corporation Commission wrote appellee a leeter informing him that he was no longer to exercise supervisory duties. After receipt of the letter the appellee's duties were to be the same as those of another hearing officer, David Kennedy, all directives theretofore issued by the appellee concerning the conduct of hearing officers and forms of orders were cancelled; all assignment of, and directives to, hearing officers were to be made by the executive secretary or his designee; and the appellee was to cease using the title of "Chief Hearing Officer." Although the import of this letter was to substantially change the scope of appellee's duties, there was no accompanying change in his salary. Further, the letter contained no indication or inference that the change in the appellee's duties was precipitated by the Corporation Commissioners' dissatisfaction with appellee's performance of his duties.

On June 21, 1976, the executive secretary terminated the appellee's employment, by letter, stating as reasons: (1) willful disobedience, (2) insurbordination and (3) improper attitude.

Pursuant to A.R.S. §41-785(A), appellee appealed his dismissal to the Personnel Board. A hearing was held before a

duly appointed hearing officer who issued findings and recommended that appellee be reinstated as a hearing officer.

Following the hearing, the Personnel Board rejected the findings of the hearing officer, made findings and conclusions of law of its own and denied the appellee's appeal.

Appellee then appealed to the superior court pursuant to A.R.S. §41-785(D). After reviewing the record established before the Personnel Board and hearing oral argument, the superior court issued a memorandum opinion and order reversing the decision of the Personnel Board to dismiss appellee, and remanding the matter to the Personnel Board for further action. An appeal was noticed from the memorandum opinion. Subsequently, this court dismissed the appeal, holding that the memorandum opinion and order was not a final judgment within the meaning of A.R.S. §12-2101(B). A formal judgment was subsequently entered by the superior court on August 29, 1979, and this appeal perfected.

The appellants contend that the superior court exceeded the scope of review permitted under A.R.S. §41-785(D), by weighing the evidence and substituting its own judgment for that of the Personnel Board. They cite ample evidence in the record to support the grounds for dismissal found by the Board and assert that the superior court can only reverse a Personnel Board's decision where there is no evidence in the record to support the Board's findings.

The dismissal of a permanent public employee is limited to situations involving cause. State Personnel Commission v. Webb, 18 Ariz. App. 69, 500 P.2d 329 (1972). Under the laws governing personnel administration, insubordination, willful disobedience and improper attitude, among other grounds, constitute cause for dismissal or discipline of a state employee. A.R.S. §41-770. An employee may appeal

his dismissal to the State Personnel Board. A.R.S. §41-785(A).

As was the case herein, the Personnel Board may assign an appeal to a duly appointed hearing officer. State Personnel Board Rule: R.2-5-33(B)(4). The hearing officer acts as the representative of the Personnel Board and is authorized to take such action as the Board itself is authorized to take by law and by the rules of the Personnel Board, "other than making the final findings of fact, conclusions of law, and order." (emphasis added). Id.

The principal function assigned to the hearing officer, after receiving the evidence, is to "write and submit a report embodying findings of fact, conclusions of law and recommendations, as well as a brief statement of reasons for his findings and conclusions." Id.

In the instant case the hearing officer concluded: "(1) The Corporation Commission failed to prove by a preponderance of the evidence the existence or validity of the reasons advanced for dismissing the appellee from state service in the 'dismissal letter'; (2) The evidence did not establish that the appellee was guilty of willful disobedience, insubordination or had an improper attitude." Therefore, the hearing officer came to the legal conclusion that appellee did not violate the provisions of A.R.S. §41-770(4), (6) and (14), and should not have been dismissed by the appellant.

After a review of the transcript of the testimony at the hearing and the exhibits and other documents submitted at the hearing, the Board rejected the hearing officer's findings of fact, in part, and made new findings of fact and conclusions of law. The Board's action was taken pursuant to the Personnel Board Rules and Regulations which provide, "the Board may affirm, reverse, adopt, modify, supplement, amend or reject the hearing officer's report in whole or in part, may

recommit the matter to the hearing officer with instructions, may convene itself as a hearing body, or may make any other appropriate disposition of the appeal." R.2-5-33(13).

It is clear, both by statute and regulation, that the Personnel Board is the final fact finder and that the function of the hearing officer is advisory only.

We find nothing constitutionally infirm in this procedure. The Personnel Board possesses no supervisory authority over the state employees whose appeals it hears and therefore satisfies the requirement of being a fair and impartial tribunal. See, Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

Moreover, when the Board delegates its responsibility to conduct an evidentiary hearing to a hearing officer, it does so as a convenience to itself alone. By assigning some of its duties to a hearing officer, the Board is freed of the time consuming evidence gathering tasks which can be performed adequately by a subordinate individual. This practice has been found to comport with due process standards especially where the Board decision is based upon the official record before the hearing officer. Fulton v. Dysart Schools, 1 CA-CIV 5827 (filed this date).

The Personnel Board's decision found that the evidence justified the following factual conclusions:

> 1. That the testimony of Donald E. Vance and Rodger Golston together with Exhibit 4 establishes that Appellant continued to use the title, "Chief Hearing Officer" in defiance of the written direction by Respondent that he discontinue its use.
>
> 2. That Appellant asserted that he was responsible for the supervision of two Hearing Officers in Phoenix and one illegal Heraing Officer in Tucson and in papers filed by Appellant subsequent to the hearing he has continued to argue that the Hearing Officer in Tucson

is illegal, thus criticizing the Commissioners in the performance of their management prerogatives.

3. That Appellant, in his conversations with Mr. Vance, criticized the Commissioners, impugned their integrity and suggested that he had inside information concerning the Commissioners which might be presented to a grand jury if he was not permitted to continue as Chief Hearing Officer. There is no basis for doubting the truthfulness of Mr. Vance's testimony in this instance.

4. That Appellant, by his own admission, discussed Commission business with outside parties other than legal counsel.

5. That Appellant was and is of the firm opinion that he has personally been misused by the Commission. His constant expression of this opinion to fellow employees has had a disrupting affect upon them. To the extent of that disruption his efficiency as a Hearing Officer has been diminished. By way of clarification a Hearing Officer who conducts his hearings and writes his reports with a high degree of efficiency can become almost useless by allowing his feelings of abuse and misuse to so affect his attitude and conduct that he disrupts fellow employees and superiors to the point that the overall function of his employer is disturbed and diminished. In that respect his efficiency as a Hearing Officer is lessened.

The Board then made the following conclusions of law in denying the appellee's appeal:

1. That Appellant's continued use of the title, "Chief Hearing Officer" and his statements that he had Hearing Officers under his supervision after he had been specifically directed not to use said title and after he had been informed that he no longer had any supervisory authority over any Hearing Officer constituted wilful disobedience under A.R.S. 41-770.

2. That Appellant's continued reference to the illegal Hearing Officer in Tucson, his continued criticism of the Commissioners and his apparent threat to present his inside information to a grand jury unless those

Commissioners continued him as a Chief Hearing Officer constituted insubordination under A.R.S. 41-770.

3. That Appellant's discussion of Commission business with outside parties and his actions and talk within the Commission resulting from his belief that he was being misused constituted an improper attitude under A.R.S. 41-770.

4. That Appellant's conduct as an employee of Respondent, as above described, justified Respondent, under law, to dismiss him.

The grounds which a dismissed employee may urge on appeal to the superior court are limited by A.R.S. §41-785(D) and are in keeping with the legislative scheme of vesting ultimate decision making power in the administrative board. Fulton v. Dysart, supra. The scope of review on appeal to the superior court is limited by this statute to a determination of whether the order was:

1. Founded on or contained error of law which shall specifically include error of construction or application of any pertinent rules.

2. Unsupported by any evidence as disclosed by the entire record.

3. Materially affected by unlawful procedure.

4. Based on violation of any constitutional provision.

5. Arbitrary and capricious.

A.R.S. §41-785(D).

The factual and legal basis for the trial court's judgment is set forth in its memorandum opinion. The memorandum opinion details the evidentiary basis and legal conclusions upon which the judge relied in making his ultimate judgment. The superior court apparently conducted its review under A.R.S. §41-785(D)(2), by reviewing the evidence as applied to the stated reasons for the appellee's termination.

The scope of review on appeal of an administrative agency

under the provisions of A.R.S. §41-785 is set forth in Board of Education of Tempe Union High School v. Lammle, 122 Ariz. 522, 526, 596 P.2d 48, 52 (App. 1979): "[T]he superior court may not substitute its determination of good cause for that of the board and is limited to a determination of whether reasonable evidence supports the board's finding, and if so, whether the determination that good cause exists is arbitrary, capricious or an abuse of discretion." The superior court is not to weigh the evidence on which the decision is based. The court must uphold the decision of the administrative body unless the decision sought to be reviewed is without any reasonable evidence to support it, or is absolutely contrary to the evidence upon which it purports to rest. A.R.S. §41-785(D)(2).

There can be no question here but that there was reasonable evidence to support the causes stated for appellee's dismissal. Without going into evidentiary detail, testimony and documentary evidence was introduced which substantiated the charges against appellee including his continued use of the title, "Chief Hearing Officer", his assertion of supervisory authority over other hearing officers, his constant criticism of and improper attitude toward the corporation commissioners, and his disruptive and negative impact on co-employees.

It appears from the memorandum opinion that the superior court judge did not feel that the weight of the evidence substantiated the charges of willful disobedience or insubordination. Further, the judge did not accept "improper attitude" as a cause justifying removal, stating that the term was too indefinite and uncertain to constitute a cause for dismissal. The judge's decision to overrule the Board's determinations on these issues, where there was "reasonable evi-

dence" in the record to sustain them, constitute error. Neither the trial court nor this court may ignore A.R.S. §41-770, establishing causes for dismissal, absent a showing that the statute is arbitrary in nature having no substantial relationship to the end sought to be accomplished. See, Civil Service Board of City of Phoenix v. Warren, 74 Ariz. 88, 244 P.2d 1157 (1952).

Reviewing the charges against the appellee we cannot say that permitting the appellee to continue his employment while violating the provisions of A.R.S. §41-770 could not have been detrimental to the efficient operation of the Corporation Commission in fulfilling its constitutional obligations. A.R.S. §41-781 through §41-785, and the rules enacted pursuant to A.R.S. §41-782(1), vest discretion in the Personnel Board, not in the courts, to determine when a violation of A.R.S. §41-770 has occurred and whether the violation is sufficient to justify termination. Review in the superior court is not by trial de novo. A.R.S. §41-785. Under these circumstances the court will interfere only when there is no reasonable evidence to support the Board's decision.

In determining whether the Board's decision is reasonable and based on the evidence, as distinguished from arbitrary and capricious, a court must bear in mind that this standard may permit a difference of opinion on the same subject. Tucson Public Schools, District No. 1 of Pima County, v. Green, 17 Ariz. App. 91, 495 P.2d 861 (1972). A decision is not arbitrary and capricious if it is exercised honestly upon due consideration for facts and circumstances, even though there may be room for diverse opinions and it is believed that an erroneous conclusion has been reached. Id. Here the Personnel Board's decision was supported by evidence in the record, and, the superior court should have affirmed that decision on review.

The judgment of the superior court is reversed and the Personnel Board's decision of dismissal is reinstated.

LAURANCE T. WREN, CHIEF JUDGE
Division One

CONCURRING:

EINO M. JACOBSON, PRESIDING JUDGE
Department B

YALE McFATE, JUDGE

NOTE: The Honorable Yale McFate, a retired judge of a court of record, was authorized to participate by the Chief Justice of the Supreme Court pursuant to Ariz.Const.Art. VI, §20.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of LAWRENCE J. EVANS JR., Appellant-Appellee, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Respondents-Appellants.	No. 1-CA-CIV 5099 Maricopa County Superior Court No. C-386611 MOTION FOR REHEARING

COMES NOW the Appellant-Appellee herein, by and through its counsel undersigned, and pursuant to the provisions of Rule 22(a) ARCAP and moves this Honorable Court for its order granting a rehearing in the above-entitled cause and action, and upon rehearing, vacating its earlier opinion, and issuing its mandate affirming the decision of the Superior Court.

This Motion is made upon the grounds and for the reasons set forth in the Memorandum of Points and Authorities attached herewith.

DATED this 11th day of February, 1982.

/s/ Lawrence J. Evans Jr.
LAWRENCE J. EVANS JR.
539 East Erie Drive
Tempe, Arizona 85282
Appellee and Co-Counsel

Copy of the foregoing mailed/delivered
this ___ day of February, 1982, to:

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The Honorable B. Michael Dann, Judge
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/s/ Lawrence J. Evans Jr.

and

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[handwritten: (Now with Lebowitz & Fondorf)

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In general, it may be said that the proceedings in a trial court should be upheld unless they violate the very essence of a scheme of ordered liberty. Fitzgibbons v. Hancock, 82 A.2d 769, 97 N.H. 162, C.J.S. 16A, Section 567, pages 541-542. The opinion of the Court of Appeals indicates no "violation of a scheme of ordered liberty" by the Honorable Charles L. Hardy, the judge presiding below. The Court of Appeals has expressed in its opinion the undesireability of Judge Hardy looking at the evidence relative to that which the Appellee was specifically charged in order to correctly judge whether the Personnel Board had or had not violated any of the Appellee's rights. How else could Judge Hardy have performed his judicial duties in performing a judicial review of an administrative agency action? It is inconceivable that any appellate court should rest its holding not on the law, not on the prevailing statute, but upon self-serving internal regulations promulgated by the very Personnel Board, without any statutory authority to assume the rights and powers it proscribed to itself. Nowhere in the Arizona Revised Statutes does the Legislature grant the power to the Personnel Board to restrict the hearing officer to "other than making the final findings of fact, conclusions of law, and order." (emphasis added by the Court of Appeals).

It is the Appellee's position that there are some 111 Administrative Boards, Commission and Agencies in the state government of Arizona. All of which have been established under varying criteria and statutes, and all differing in the degree of authority or responsibility assigned to them. This ranges from the Arizona Corporation Commission that the Supreme Court of Arizona has held is a fourth branch of

government having executive, legislative and judicial powers granted by the Constitution, to the Ethics Board which has little or no power.

We are here interested only in the Personnel Board. A.R.S. §41-785(B) states, in part:

> "The personnel board, or a duly appointed hearing officer, shall conduct the hearing and is authorized to take evidence and exercise the rights prescribed by § 12-2212."

It is the position of the Appellee that when the personnel board conducts the hearing it has the power, authority, responsibility and duty to take evidence, make findings of fact, reach conclusions of law only from those findings of fact, and issue an appropriate Decision and Order.

However, when addressing the "or" portion of the statute it is the Appellee's position that the politically appointed laymen board can reach differing conclusions of law — it being a fact of life that different men can reach different conclusions from the same set of facts — otherwise we wouldn't have appellate courts. From these differing conclusions of law they can support a different Decision and Order. But once they have delegated their responsibilities to a hearing officer to take the evidence in their absence — they do not have the power, authority, responsibility or duty to change those facts to create a scenario that will justify any conclusions of law they may desire to make.

Appellee submits three examples or hypothesis in analagous support of this position:

First, if the Hearing Officer finds as a fact that petitioner has a well and its pump will produce 500 gallons of water per minute and is therefore capable of sustaining the needs of the immediate community, it is not within the prerogatives

of the politically appointed laymen administrative board to change that finding of fact to be 15 gallons of water per minute in order to justify a conclusion of law wherein they could deny certification to a petitioner.

Second, if the Hearing Officer finds as a fact that petitioner has a tractor and flat bed trailer capable of carrying 20,000 lbs gross tonnage, and is of sufficient length not to endanger the highways of the State of Arizona while carrying steel rails, it is not within the prerogatives of the politically appointed laymen administrative board to change that finding of fact to be a "¾ ton pickup truck" in order to justify a conclusion of law wherein they could deny certification to a petitioner.

Third, if the Hearing Officer finds as a fact that petitioner has a four engine cargo aircraft capable of flying from Douglas to Kingman carrying fire depressant materials, it is not within the prerogatives of the politically appointed laymen administrative board to change that finding of fact to be a "single engine passenger aircraft" in order to justify a conclusion of law wherein they could deny certification to a petitioner.

In short, when the Personnel Board conducts the hearing, it itself becomes the trier of fact. But when it delegates that authority to a trained lawyer, and in this instance a retired Judge of some 40 years experience, that Hearing Officer becomes the trier of fact — and his findings of fact are not to be disturbed absent extremely compelling and substantial evidence to the contrary.

The Court of Appeals can take judicial notice of the fact that only the trier of fact, in this case the Hearing Officer, has the capability to adjudge the demeanor of the witness, the atittude of the witnesses, and to evaluate the credibility

of their testimony. In the instant case, the Hearing Officer did so do — and included such in his findings of fact and conclusions of law.

In the instant case the Personnel Board rejected all findings of fact of the Hearing Officer and substituted therefore its own findings of fact in order to justify its own conclusions of law.

Even more incredible, it made findings of fact where there were no charges, no allegations, no evidence, and no testimony! Incredible as it may seem this Personnel Board went so far as to make a finding that the Appellee was guilty of the crime of blackmail — the elements of which being a finding that Appellee gave his employers an either you do this or I'll do that ultimatum. Of this crime he was not only guilty — he was not charged with such, nor were any such allegations made in his termination letter. Further, no evidence of an either you do this or I'll do that threat was ever introduced in the record below, either by testimony or by exhibit. The Court of Appeals has evidently relied upon misleading and false fabrications of of (sic) opposing counsel's rhetoric.

An absolutely amazing finding of fact made by the Personnel Board was that: (No. 2)

> "in papers filed by the Appellant subsequent to the hearing he has continued to argue that the Hearing Officer in Tucson is illegal, thus criticising the Commissioners in the performance of their management prerogatives"

and from this reached a Conclusion of law: (No. 2)

> "That Appellants continued reference to the illegal Hearing Officer in Tucson * * * constituted insubordination under A.R.S. §41-770."

This was a violation of Appellee's due process and statutory rights to pursue his administrative remedies. This is saying:

"You were accused of an act, your denial or explanation of that act in the hearing and in the briefs required to be submitted after the hearing constitutes insubordination."

This so enraged a California Appeals Judge, who is also an Arizona attorney, that he filed an Amicus Curiae brief in the Superior Court below — which you will find at Appendix N to Appellee's Answering Brief.

The Appellee respectfully submits that all of the above in the Introduction to this Motion for Rehearing constitutes that the Court of Appeals opinion was:

1. Founded on or contained error of law which shall specifically include error of construction or application of any pertinent rules.
2. Unsupported by any evidence as disclosed by the entire record.
3. Materially affected by unlawful procedure.
4. Based on violation of any constitutional provision.
5. Arbitrary and capricious.
   A.R.S. §41-785(D)

Further violations of due process accorded the Appellee in the Court of Appeals opinion are as follows:

CONSTITUTIONAL ERRORS

Violations of Due Process – 1.

The opinion of the Court of Appeals herein reflects a retrospective application of the law of the "reasonable evidence" rule being applied by virtue of its decisions in Board of Education of Tempe Union High School v. Lemmlee, 122 Ariz. 522, 526, 596 P.2d 48, 52 (App. 1979) and that of Fulton v. Dysart Schools, 1 CA-CIV 5827, indicated in the Court's opinion as "(filed this date)". This was so stated on pages 5, 8 and 9 of the Court's opinion. However, the "substantial

evidence" rule was the law of the State of Arizona at the date and time of the review by the Personnel Board, which occurred years earlier in 1977, and by the Superior Court, the Honorable Charles L. Hardy presiding, in 1978.

At the date and time of the review of the Personnel Board and at the date and time of the Superior Court's holding the "substantial evidence" rule or the "competent evidence" rule that had been laid down by the Supreme Court of Arizona was the law of evidence that pertained. Prior to April 10, 1979 the Supreme Court of Arizona held that the "substantial evidence" rule will be followed. Urvalejo v. Industrial Commission, 72 Ariz. 43, 230 P.2d 516; Schade v. Arizona State Retirement System, 109 Ariz. 396; Sundown Imports Inc., v. Arizona Dept. of Transp., Motor Vehicle Division, 115 Ariz. 428, 565 P.2d 1289. Prior to April 10, 1979, the Court of Appeals for Arizona also held, during the time frame of the date and time of the review by the State Personnel Board and at the time and date of the Superior Court's holding that the "substantial evidence" rule will be followed. Welsh v. Arizona State Bd. of Accountancy, 14 Ariz.App. 432. In one instance the Supreme Court of Arizona has held that the "competent evidence" rule shall pertain. Hobson v. Twentieth Century Fox Film Corp., 71 Ariz. 41. The Supreme Court of Arizona, in Talley v. Paradise Memorial Gardens, Inc., 107 Ariz. 585, 491 P.2d 439, held that:

> "Trial court's proper scope of review of an administrative ruling includes a finding based on "substantial evidence" in the record." (emphasis added)

The Federal District Court of Arizona, using Arizona law, has held in another Arizona case, that of Multiple Use, Inc. v. Morton, 353 F.Supp. 184, affirmed 504 F.2d 448, that:

> "Judicial relief from administrative action is not available unless action was arbitrary and capricious and

unsupported by "substantial evidence." (emphasis added)

By Article 1, Section 10, of the United States Constitution, the States are forbidden to pass any "ex post facto law". By Article 1, Section 25 of the Constitution of the State of Arizona the State is prohibited from enacting any "ex post facto law". By the Court of Appeals opinion it has created an analagous situation wherein a retrospective law has been formulated holding that, as of the date of the opinion, the practice of the State Personnel Board shall be as of this date (and as of the date of the Board of Education of Tempe Union High School v. Lemmlee case) to be the acceptance of a vastly different and much less standard — that of only "reasonable evidence". However, the Court has applied these two recent holdings retroactively; to the detriment of the appellee. This has perpetrated an injustice to the appellee and constitutes reversible error. It is a violation of Appellee's rights of due process.

An "ex post facto law" has been defined as: "...a law that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense..." State v. Rowe, 116 N.J.L. 48, 181 A. 706; Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356; 3 Story, Const., 212; State v. Malloy, 95 S.C. 441, 78 S.E. 995, 997, Ann.Cas.1915C, In re Jamestown Caucus Law, 43 R.I. 421, 112 A. 900, 902; State v. Teasley, 194 Ala. 574, 69 So. 723, 725, Ann.Cas. 1918E, 347; Beazell v. State of Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216, Hernandez v. State, 43 Ariz. 424, 32 P.2d 18, 24. This application of holdings made years after the events, diluting the standards of evidence to be applied is an unconstitutional breach of due process to the detriment of the Appellee.

Although ex post facto application of the law is related solely to criminal and penal matters, it has its counterpart in civil law in retrospective law and in the rule of stare decisis. Under the rule of stare decisis the Supreme Court of Arizona has held in White v. Bateman, 358 P.2d 712, 89 Ariz. 110 that the rule of stare decisis is grounded on public policy that people should know what their rights are as set out by judicial precedents and, having relied on such rights in conducting their affairs, should not have them done away with by judicial fiat. The Appellee relied on the judicial precedents set by the Supreme Court of Arizona in the "substantial evidence" holdings set forth, supra.

Also, the Supreme Court of Arizona has held in Commercial Standard Ins. Co. v. Cleveland, 345 P.2d 210, 86 Ariz. 288, that it is the duty of the court to apply general principles of law to specific cases and not to tailor them to fit a preconceived result, desirable as that result might seem. In the Court of Appeals opinion it has disregarded the law, as set forth by the Supreme Court of Arizona, that was in effect at the date and time of the alleged infractions, and at the date and time of the reviews conducted by the State Personnel Board and by the Superior Court below. There is no doubt that the Court of Appeals has established a new and lesser criteria of evidence, effective as of April 10, 1979. However, even though this new rule of "reasonable evidence" may eventually be held to be constitutionally vague, inasmuch as the Court of Appeals failed, even in 1979, to establish the "standards" which establish "reasonable evidence", it is incontrovertible that prior to 1979 the established rule of evidence in the body of Arizona law under which this case has been tried required that "substantial evidence" must support an administrative agency's findings of

fact and conclusions of law. Thus, the Honorable Charles L. Hardy of the Superior Court of Arizona was entirely justified in examining the evidence in the record to determine that there was not "substantial evidence" to support the State Personnel Board's incredible fabrication of facts that did not exist in the record, in order to justify a predetermined set of conclusions of law.

The Supreme Court of Arizona has held in Sligh v. Watson, 191 P.2d 724 that:

> "Counsel and litigants are entitled to rely upon previous decisions of the Supreme Court until they are overruled."

There was no Supreme Court holding overruling its prior "substantial evidence" rule prior to April 10, 1979. Therefore, the Court of Appeals has erroneously erred in not following the law that was in effect prior to April 10, 1979 — the date and time of the circumstances of this case. The Court of Appeals did not, in its opinion, follow the precedents set by the Supreme Court of Arizona. Thus, by applying a retroactive effect to a newly decided rule of evidence by the Court of Appeals, the due process rights of the Appellee has been fatally injured.

It is respectfully submitted that the retrospective application by the Court of Appeals of the "reasonable evidence" rule results in an impairment of Appellee's vested rights, and as such is oppressive. The Appellee's right to have the "substantial evidence" rule applied, which was the rule of law promulgated by the Supreme Court of Arizona at the date and time of the lower tribunals hearings and review, is a vested right to be treated as property which is subject to the guaranty of due process of law.

If a retrospective holding which is neither an ex post facto law nor one impairing the obligation of a contract

should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, but by reason of its repugnancy to the Fourteenth Amendment of the Federal Constitution quaranteeing due process of law. Truax v. Corrigan, 257 US 312, 66 L.Ed. 254, 42 S.Ct. 124, 27 ALR 375; Ettor v. Tacoma, 228 US 148, 57 L.Ed. 773, 33 S.Ct. 428; Aldridge v. Tuscumbia, C. & D. R. R. Co. (Ala) 2 Stew & P 199; Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P 444, 56 ALR 264; Preveslin v. Derby & Ansonia Developing Co., 112 Conn 129, 151 A. 518, 70 ALR 1426; Sanford v. McClelland, 121 Fla 253, 163 So. 513; People ex rel. Eitel v. Lindheimer, 371 Ill 367, 21 NE2d 318, 124 ALR 1472, app dismd 308 US 505, 84 L.Ed. 432, 60 S.Ct. 111; State ex rel. Boynton v. Public Service Com., 125 Kan 491, 11 P2d 999; Booth v. Hairston, 193 NC 278, 136 SE 879, 57 ALR 1196; Lowe v. Harris, 112 NC 472, 17 SE 539; Greenough v. Greenough, 11 Pa 489.

Due process of law protects against arbitrary action; consequently arbitrary action of this Court of Appeals in applying a retrospective effect to a later decided rule in it order violates due process. Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 US 510, 56 L.Ed. 863, 32 S.Ct. 535.

Violation of Due Process – 2.

The opinion of the Court of Appeals reflects a complete disregard of the violation of constitutional due process pointed out in detail on pages 47, 48 and 49 of Appellee's Answering Brief. It is again respectfully submitted that the facts in the case, as reflected in the record, are conclusive that appellee was not accorded the minimum preremoval safeguards mandated by the six justices of the Supreme

Court of the United States in Arnett v. Kennedy (1974) 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15. The distillation of Arnett v. Kennedy by the California Supreme Court in Skelly v. State Personnel Board, 124 Cal.Reptr. 14, at 28-29, was definitively briefed on pages 47, 48 and 49 of Appellee's Answering Brief.

It is respectfully submitted that the facts in the case, as reflected by the record, are conclusive that appellee was not accorded the minimum preremoval safeguards mandated by the six justices of the Supreme Court of the United States in the Arnett v. Kennedy case. Appellee was not given notice of the proposed action prior to the action itself — and the record reflects that the action was proposed in an executive session, in camera, on June 18, 1976 and the termination took place on June 21, 1976. Also, and even more damaging to appellee, he was not given the right to respond, either orally or in writing, to the authority initially imposing discipline — as proscribed by the Supreme Court of the United States in Arnett v. Kennedy, supra.

Violation of Due Process – 3.

This Court has made findings of fact on page 8 of its opinion that are completely and utterly without merit. The record below does not indicate any "continued" use of the title "Chief Hearing Officer"; but the record below, form the State's own witnesses and a document introduced into evidence as Exhibit E, from the State of Arizona's own records, proves that Appellee was in fact carried on the rolls of the State of Arizona as Chief Hearing Officer and paid as such by the Department of Administration as such up to and including the day he was terminated. This is a fact in evidence, not mere adversarial argument! The Court of Appeals even goes

further than the record or the Personnel Board in making a finding of fact of Appellant's "assertion of supervisory authority over other hearing officers". Such a fact is diametrically opposite to the evidence in the record. All testimony and evidence in the record is that Appellee immediately ceased from any assertions of supervisory authority over other hearing officers when told to do so. He did not supervise any of them from the date he was told to do so; which is completely substantiated by the testimony and evidence introduced in the record below. There is absolutely no testimony or evidence whatsoever introduced in the record below of Appellee's "constant criticism of and improper attitude toward the corporation commissioners'. Even the Corporation Commissioner's star witness, the impeached Donald E. Vance, submitted that Appellee never wrote any memoranda other than for "clarification" purposes. The further finding by the Court of Appeals that Appellee had a "disruptive and negative impact on co-employees" was never introduced, let alone substantiated in the record below. All of the testimony of co-employees, in the record below, indicates that no such impact occurred. The impeached witness, Donald E. Vance, suggested so, but offered no witnesses or evidence whatsoever to substantiate this false assertion.

It is respectfully submitted that the record in this case is not only deficient — but entirely devoid of any substantive evidence to support the Court of Appeals findings. The Court of Appeals opinion, as written, reflects solely the hyperbole of distortions and fabrications of fact expounded in the rhetoric of counsel for Appellant.

Violation of Due Process – 4.

The Court of Appeals, by its own admission in open court,

stated that it had lost all of the records of this case that had been forwarded to it by the Superior Court. Therefore, the Court of Appeals has apparently relied only upon those records that it desired to xerox from opposing counsels files that they had brought to the hearing. It is unknown by Appellee what files, if any, were xeroxed and considered, but Appellee's Answering Brief and Appendices thereto apparently were totally ignored. It is respectfully submitted that under either the "substantial evidence" rule or the "reasonable evidence" rule Appellee's Answering Brief and Appendices thereto effectively disposed of every issue.

The responsibility of the Court of Appeals should be to ascertain whether justice was done, whether the rights of the individual was protected, whether the standards of fair play were ensured; not to simply use a case as a vehicle to promote a new rule of law, the end result of which allows a politically appointed administrative board of laymen to be allowed free rein to do whatever the political pressures of the moment dispose them to do.

In the absence of all of the records, or any part of them, in the matter below, it is incumbent upon the Court of Appeals not to disturb the decision of the Superior Court, which had all of the records before it when it accomplished its judicial review of the matter. For the Court of Appeals to reverse the decision of the lower court without the complete record before them constitutes a gross violation of Appellee's rights of due process under the Fourteenth Amendment to the Constitution of the United States.

It is further noted that on pages 5, 6 and 7 of the Court of Appeals opinion it cites verbatim the conclusions of the Personnel Board and asserted that they were "factual" conclusions. If the records of this case below were "lost" or had

"disappeared" from the Court of Appeals files, they still had available at Appendix K to Appellee's Answering Brief the actual Appeal Brief As to Facts and Law that was submitted to the Superior Court below. In Appendix K the Court of Appeals will find the findings of fact of the Personnel Board completely rebutted, without merit, and not factual, at pages 21 thru 35. In Appendix K the Court of Appeals will also find the conclusions of law of the Personnel Board completely rebutted, without merit, and not factual, at pages 35 thru 44.

The principles of due process require that a fair and impartial review of both sides of a question be applied by the Court of Appeals. In the Court of Appeals opinion none of the arguments or reasoning of the Appellee was addressed by the court. This constitutes an injustice and a gross violation of Appellee's rights under the Fourteenth Amendment to the Constitution of the United States.

Violation of due process – 5.

In Asarco, Inc. v. Industrial Commission, 122 Ariz. 241, 594 P.2d 107, this Court of Appeals held:

> "We hold that Memoranda Decisions should not be cited as authority by counsel. Further, we agree with State Bar of Arizona Ethics Opinions No. 78-4 (January 30, 1978), that it is a breach of professional ethics to cite such decisions other than for the purpose of establishing res judicata, collateral estoppel, or the law of the case."

It must be noted by the Court of Appeals that Appellants filed their Opening Brief entirely on the ARCAP Memorandum Opinion and Order and in their Reply Brief (on page 30) reiterated that their appeal was based on the ARCAP Memorandum Opinion and Order.

The Court of Appeals not only failed to strike both of Appellant's briefs and dismiss their appeal for a direct violation

by Appellants of the law established by this very Court of Appeals on March 1, 1979 in ASARCO, but compounded the injury to Appellee by violating its own holding and citing on page 8 of its opinion that:

> "The memorandum opinion details the evidentiary basis and legal conclusions upon which the judge relied in making his ultimate judgment."

It is respectfully submitted that the Appellee is entitled to depend upon the prior holdings of this Court of Appeals. By itself citing and relying upon the memorandum opinion of the Honorable Charles L. Hardy it has violated the constitutional due process rights of Appellee and has allowed unlawful procedure to guide its review.

Violation of due process – 6.

A review by this Court of Appeals of both the Appellants Opening Brief and Appellants Reply Brief will reveal that never once did the Appellants present any arguments for a "reasonable evidence" rule. Rather, their entire argument at the Superior Court level and at the Court of Appeals level in all briefs submitted was that "any" evidence should suffice to support the Personnel Board.

The Court of Appeals by rendering its opinion on "reasonable evidence" has entered the adversarial field on behalf of the Appellants. Its duties are clearly not adversarial but are restricted to those of conducting an impartial and unbiased judicial review of the facts. It is Appellees position, respectfully submitted, that this has not happened in this matter. It is respectfully submitted that the Court of Appeals has been impressed by imaginative rhetoric of counsel for Appellants and has not reviewed the basic facts. If the Court of Appeals had reviewed the facts in the case, as did the Superior Court below, it would clearly perceive that the action

of the Personnel Board in rejecting all of the findings of fact of the Hearing Officer and substituting therefore its own findings of facts, none of which were based upon the testimony and evidence in the record was obviously done to support a preconceived set of conclusions of law.

By the Court of Appeals having assumed an adversarial role in its opinion it is respectfully submitted that the Appellee herein has been fatally injured by a violation of his constitutional rights of due process to have a fair and impartial review of the record. The Court of Appeals, by its opinion, abandoned the judicial review role and assumed an adversarial role.

Violation of due process – 7.

The Court of Appeals in its opinion, at page 9, has held that "Neither the trial court nor this court may ignore A.R.S. §41-770 establishing causes for dismissal, absent a showing that the statute is arbitrary in nature having no substantial relationship to the end sought to be accomplished." In this the Court of Appeals has ignored the holding of the Supreme Court of the United States in Smith v. Goguen (1974) 415 U.S. 566, 39 L.Ed2d 605, 95 S.Ct. 1242, wherein the Supreme Court set the required "standards" rule. In Smith v. Goguen the highest Court held:

> "the "void for vagueness doctrine" not only requires notions of fair notice, but "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts * * * * * Legislatures may not so abdicate their responsibilities for setting the standards....."

Appellee's position in this matter is that wherein each of the 111 administrative boards, commissions and agencies have promulgated "standards" within their respective bodies, then there can be made argument that in other fact cases the phrase "improper attitude" could be upheld. But in the instant case there were not standards of conduct ever promulgated by the Arizona Corporation Commission wherein its employees were made aware of what "standards" created cause for dismissal. Therefore, under the circumstances of "no standards whatsoever", the Superior Court below was entirely correct in finding the statute "unconstitutionally vague" in the facts of this matter.

Further, Appellee submits that no "standards" could be set by the Personnel Board that would cover all 111 administrative boards, commissions, and agencies in Arizona state government. A "standard" promulgated by the Arizona Corporation Commission that all male employees would wear a suitcoat and tie would not be applicable to the Fish and Game Commission wardens or the Livestock Inspectors who are frequently working in the wilderness.

By thus ignoring the "standards" rule set forth by the Supreme Court of the United States, the Court of Appeals has fatally injured the Appellee's right of constitutional due process.

Violation of due process – 8.

In Appendix N of Appellee's Answering Brief an Amicus Curiae brief filed by Judge Cummerford wherein is articulated much more eloquently than Appellee can express the constitutional violations of due process. He states on page 7 thereof:

"It is not only a denial of due process of law, but

represents an unlawful assumption of jurisdiction by the Arizona State Personnel Board of matters beyond its scope within the context of this case. It is clearly an ultra vires act."

The above is addressed to the findings of fact and conclusions of law of the Personnel Board upon which the Court of Appeals in its opinion has favorably approved. The Appellee respectfully submits that the Amicus Curiae brief is based solely upon the legal and judicial experience of a man of over 35 years experience, at least ten of which are on the bench, and was entirely unsolicited by Appellee.

Violation of due process – 9.

The Court of Appeals in its opinion at page 5 held that "the Board may affirm, reverse, adopt, modify, supplement, amend or reject the hearing officer's report in whole or in part, may recommit the matter to the hearing officer with instructions, may convene itself as a hearing body, or may make any other appropriate disposition of the appeal." The Court of Appeals cites as authority for this holding the Personnel Board's own self serving rule R2-5-33(13) which it promulgated itself without any statutory authority to give itself this power. Such is not the law. The statute, A.R.S. § 41-785(B) states:

"...the personnel board, or a duly appointed hearing officer, shall conduct the hearing...." (emphasis added)

Nowhere in the Arizona Revised Statutes does the legislature grant the Personnel Board the power that it has granted itself in R2-5-33(33). Further the Supreme Court of the United States has specifically held that type of power cannot be entrusted to a reviewing authority that has not heard the case. In Morgan v. United States, 298 U.S. 468 at 481, the holding of the highest court is clear and specific:

"The one who decides must hear."

Further, the determination of credibility of a witness can best be determined by the trier of fact, the Hearing Officer, not later reversed by a public board which had no opportunity, training or experience to judge the testimony or evidence. Appellant respectfully submits that the Hearing Officer was the trier of fact, and as such he was in the only position to determine whether the testimony of a witness was worthy of belief. In this respect the following is the criteria taught by the National Judicial College (the former National College of the State Judiciary) of which Appellee is a graduate, by all known authorities of Evidence, and is included in the California Evidence Code as Section 780 (a) thru (k), and is generally considered by the trier of fact:

1. His demeanor while testifying and the manner in which he testified.
2. The character of his testimony.
3. The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testified.
4. The extent of his opportunity to perceive any matter about which he testified.
5. Was his testimony corroborated?
6. Was his testimony rebutted?
7. If his testimony was rebutted, did the opposing party have the opportunity to present corroborating testimony, but was unable to do so because none was available?

The credibility of all of the testimony and evidence was assessed by the Hearing Officer and his Report indicated that evidence omitted was deemed not sufficiently credible to be worthy of belief.

Violation of due process – 10.

The Court of Appeals in its opinion at page 9 has held that "...the court will interfere only when there is no reasonable evidence to support the Board's decision." (emphasis added) It is respectfully submitted that should a judicial review reveal that a politically appointed laymen review board overruled the entire findings of fact and the conclusions of law reached by a professional lawyer and Judge of some 40 years experience, after conducting an eight day trial, it is respectfully submitted that it is the duty of the judicial review to examine the evidence to determine whether it is "competent evidence" (quality) or "substantial evidence" under the rule of law pertaining at that time. This is particularly essential in view of the holding of the Supreme Court of the United States in the landmark case of Morgan v. United States, 298 U.S. 468 at 481:

> "The officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument..... It is a duty akin to that of a judge. The one who decides must hear." (emphasis added)

It was apparent to both Hearing Officers below and to Judge Charles L. Hardy at the Superior Court, as it must be apparent to the Court of Appeals, that in this case the one who decided (i.e., the Personnel Board) did not hear.

Violation of due process – 11.

The Court of Appeals in its opinion on page 9 condemns the Superior Court, the Honorable Charles L. Hardy presiding, by stating:

"The superior court apparently conducted its review

> under A.R.S. §41-785(D)(2), by reviewing the evidence as applied to the stated reasons for appellee's termination."

The statute referred to states "Unsupported by any evidence as disclosed by the entire record." as grounds for appeal. However, the Court of Appeals in its opinion — if it analyzed the facts and evidence at all — would have had to have weighed the evidence itself in order to make the completely unsupportable finding on page 8 of its opinion that:

> "There can be no question here but that there was reasonable evidence to support the causes stated for appellee's dismissal."

Herein we find that which is unlawful for the Superior Court to do in conducting a judicial review now miraculously becomes lawful for the Court of Appeals to do.

This two way street or double edged sword of applying the law has constituted an injustice and a gross violation of Appellee's rights under the Fourteenth Amendment to the Constitution of the United States.

Violation of due process – 12.

The depth and absurdity of the Personnel Board's findings of fact is given the seal of approval by the Court of Appeals. One such ridiculous finding, noted by both Judge Kopp and Judge Hardy below, is finding of fact number 4 (page 6 of the Court of Appeals opinion):

> "That Appellant by his own admission discussed Commission business with outside parties other than legal counsel."

There is no known prohibition of law, nor has there ever been one to prohibit discussing matters of public record. This finding of fact is no more absurd than that of stating: "The Appellant continued to breathe when told to cease doing so." The impact of the Court of Appeals opinion would

give the latter case as much credence as the former — neither of which are based on law, statutory or judicial, or upon reason.

The Court of Appeals opinion gives further seal of approval to the absurd conclusion of law Number 4, which the Personnel Board derived from such an unlawful find of fact as described above, by its finding that there was "reasonable evidence" to support such a Personnel Board opinion.

This unconscionable granting the coloration of credibility and the force and effect of law to an unreasonable finding of fact and conclusion of law introduced by the politically appointed laymen Personnel Board constitutes a gross violation of Appellee's constitutional rights of due process. He has been denied a fair and impartial judicial review of the actual facts in the matter. (See Tab K, page 32, lines 20-25, of Appellee's Answering Brief.)

Violation of due process – 13.

The Court of Appeals opinion on page 4 states:

> "...the Board rejected the hearing officers findings of fact, in part, and made new findings of fact and conclusions of law." (emphasis added)

If the Court of Appeals had examined the record below they would have found that this has no basis whatsoever in the record below. The Personnel Board rejected all, each and every single finding of fact and conclusion of law of the hearing officer.

By the Court of Appeals opinion, as stated above, it gives unwarranted credence to a sincere and impartial review by the Personnel Board as having applied "discretion" to its review; rather than being completely arbitrary and capricious in its judgment. It is not reasonable to believe that Judge Kopp, with over 40 years of experience as an attorney

and professional judge, to have been completely and utterly incorrect in assessing the credibility of the witnesses and the evidence. Nor is it reasonable to ascribe to the Honorable Charles L. Hardy, that he too could not have examined the evidence and have found it totally lacking.

Violation of due process – 14.

The Court of Appeals opinion on page 5 states:

"The Personnel Board possesses no supervisory authority over the state employees whose appeals it hears and therefore satisfies the requirements of being a fair and impartial tribunal. See, Perry v. Sinderman, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254);070)"

A review of Perry v. Sinderman reveals that no such issue was presented in this case; no dicta supplied; and no holding that an independent politically appointed board of laymen, because it possesses no supervisory authority over the state employees whose appeals it hears, therefore satisfies the requirements of being a fair and impartial tribunal. The Court of Appeals has herein made a reversible error of law.

A review of Goldberg v. Kelly also reveals that no such issue was presented in this case; no dicta supplied; and no holding that an independent politically appointed board of laymen, because it possesses no supervisory authority over the state employees whose appeals it hears, therefore satisfies the requirements of being a fair and impartial tribunal. The Court of Appeals has herein made a reversible error of law.

By the Court of Appeals relying upon not only distinguishable cases, but cases which are completely and utterly not in support of its presumption, it has acted in an arbitrary and capricious manner. Thus, it has deprived the Appellee herein of his constitutionally provided rights of due process to receive a fair and impartial review of the record by the Court of

Appeals and for the Court to have relied on factual case law.

Violation of due process – 15.

The Court of Appeals has made an unconscionable granting of the coloration of credibility and the force and effect of law, on page 6 of its opinion, to the unreasonable finding of fact No. 3 by the Personnel Board that "There is no basis for doubting the truthfulness of Mr. Vance's testimony in this instance."

The Court of Appeals is reminded that the record below indicates that not one single witness was called to corroborate Mr. Vance's testimony; that Mr. Vance's testimony was completely and utterly rebutted on the record; that Appellants' own witness, Andrew M. Bettwy, the then Chief Hearing Officer of the Appellants, testified as follows: (Tr VIII, pages 54 and 55) that he knew Don Vance well enough to have an opinion as to his truth and veracity, that Don had the gift of gab, that Don "could tell a story that would make you wonder if you were at the same place that he was when the event occurred."

Appellee's witness, David Kennedy, Hearing Officer for Appellants before, during and after the circumstances of the matter, testified that "Don has been described, and I think somewhat accurately, he is a great bullshit artist." (Tr V, page 39)

By the summation of all of the evidence introduced in the record below it can only be determined by any impartial tribunal that Mr. Vance had been impeached as a liar, one who's credibility was unworthy of belief. Appellee submits that the above are facts, supported by substantial evidence, reasonable evidence, competent evidence, all within the record, and not mere adversarial argument.

The trier of fact, Judge Kopp (See, Appendix B, pages 9 and 10, to Appellee's Answering Brief) was the only man capable of judging the credibility of the witness (See, Violation of due process – 8, supra) and he found:

> "I was impressed with the testimony of these two witnesses and am, therefore, inclined to be a little doubtful of the unsupported testimony of Mr. Vance. This doubt is increased by the failure of Respondent to call those witnesses who might have corroborated Vance's testimony."

This unconscionable granting the coloration of credibility and force and effect of law to an unreasonable finding of fact and conclusion of law by the politically appointed laymen Personnel Board, which found an impeached witness, Donald Vance, to having given testimony that worthy of more weight alone than all of the rebutting evidence. This is the Donald E. Vance we are talking about; the one who was forced to resign from his position in state government for being a thief (See, Tab K, page 21, lines 15-21) and whose reputation in the community, by the above, can only be credited as one of complete unreliability — one that is not worthy of belief. Thus, the Court of Appeals has again deprived the Appellee herein of his constitutionally provided rights of due process to receive a fair and impartial review of the record by the Court of Appeals.

Violation of due process – 16.

The Court of Appeals opinion reflects a complete disregard of Appellee's Answering Brief, with Appendices, and the record below, which it freely admitted in open court that it did not have — they having disappeared from the Court of Appeals repository — which which (sic) record definitively rebuts each and every allegation of Appellants

in minute detail. The Court of Appeals has cited verbatim the findings of fact and conclusions of law of the Personnel Board that were conclusively proven false. The Court of Appeals, by not considering the record below and by not considering Appellee's Answering Brief with Appendices, has acted in an arbitrary and capricious manner in this matter.

It is obvious from the most cursory reading of the Court of Appeals opinion that it was so desirous of supporting its more recent holding in Board of Education of Tempe Union High School v. Lammle of April 10, 1979, that it neglected not only to give any weight whatsoever to Appellee's Answering Brief, with Appendices, that it is Appellee's sincere and honest belief that it did not even read them. It certainly did not address any of the legal precedents contained therein.

Thus, by not addressing those legal precedents and the arguments contained therein the Court of Appeals has further violated the constitutionally protected rights of due process of Appellee by not providing Appellee with a fair and impartial judicial review.

SUMMARY

The opinion of the Court of Appeals is quite clear that it desires to base the judicial review of administrative agencies based upon its "reasonable evidence" rule first expressed by this Court of Appeals on April 10, 1979 in Board of Education of Tempe Union High School District of Maricopa County v. Lammle, 122 Ariz. 572, 526, 596 P.2d 48, 52. However, to do so it must do so retroactively, to a time and date when such "reasonable evidence" rule was not the law of Arizona.

The Court of Appeals opinion is tantamount to the calling of a citizen before a tribunal and stating:

"that although the law in 1976 stated that you could drive 65 mph on the public highways, the more recent law proscribes a 55 mph speed limit. You, having traveled 65 mph in 1976, are now adjudged guilty by virtue of the later law established in 1979."

Further, when the Personnel Board follows the only statutory power granted them in A.R.S. §41-785(B):

"The Personnel Board, or a duly appointed hearing officer, shall conduct the hearing...." (emphasis added) (See pages 8-10, supra)

then it itself becomes the trier of fact when it conducts a hearing. But when it delegates that authority to a trained lawyer, and in this instance a retired Judge of some 40 years of experience, that Hearing Officer becomes the trier of fact — and his findings of fact are not to be disturbed absent extremely compelling and substantial evidence to the contrary. This does not mean at all that the State Personnel Board cannot come to different conclusions of law and reach a different decision based on the same set of facts. But to change the facts, without foundation in testimony or evidence in the record is clearly a violation of Appellee's constitutional rights of due process. (See, Introduction, pages 2 and 3, supra, and see, Violation of due process – 8, supra)

The Court of Appeals cannot find any statutory power granted by the Legislature to the Personnel Board to grant to itself by internal rules powers greater than that which is proscribed within A.R.S. §41-785. Both R2-5-33(B)(4) and R2-5-33(13) are clearly ultra vires acts.

A total of sixteen enumerated violations of Appellee's constitutionally provided rights of due process is above and beyond the judicial discretion of the Court of Appeals. The delineation of the "property" rights under the Fourteenth Amendment vested in Appellee to retain his employment, by virtue of his having been a merit system employee, were

thoroughly briefed on pages 12 and 13 of Appendix K to Appellee's Answering Brief.

Respectfully submitted for decision on the record and without any further oral argument this ____ day of February, 1982.

LAW OFFICES OF LAWRENCE J. EVANS JR.

By /s/ Lawrence J. Evans Jr.
Lawrence J. Evans Jr.
539 East Erie Drive
Tempe, Arizona 85282
Co-counsel and Appellee

Copy of the foregoing mailed/delivered
this 11th day of February, 1982, to

SHIRLEY H. FRONDORF
Lebowitz and Frondorf
141 East Palm Lane, Suite 111
Phoenix, Arizona 85012

JOHN W. ACER
3033 North Central Avenue, Suite 410
Phoenix, Arizona 85012
Co-counsel for Appellee

Mr. Mack T. Jones
Attorney at Law
4444 North Seventh Avenue, Suite 501
Phoenix, Arizona 85013

The Honorable B. Michael Dann, Judge
Maricopa County Superior Court
East Court Building
101 West Jefferson Street
Phoenix, Arizona 85003

/s/ Lawrence J. Evans Jr.

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of LAWRENCE J. EVANS, JR., Appellee, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Appellants.	(Filed: March 8, 1982) 1 CA-CIV 5099 DEPARTMENT B MARICOPA County Superior Court No. C-386611 ORDER

The motion for rehearing and the response thereto were considered by the Court, Presiding Judge Eino M. Jacobson and Judges Laurance T. Wren and Yale McFate participating.

IT IS ORDERED denying the motion.

DATED this 8th day of March, 1982.

/s/ Eino M. Jacobson
EINO M. JACOBSON, Presiding Judge

A true copy of the foregoing order was mailed this 8th day of March, 1972, to:

Mr. Lawrence J. Evans, Jr.
539 East Erie Drive
Tempe, Arizona 85282
and
Mr. John W. Acer
3033 North Central Avenue

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Phoenix, Arizona 85012
Attorneys for Appellee

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Phoenix, Arizona 85013
Attorneys for Appellants

GLEN D. CLARK, CLERK
BY

/s/ (signature illegible)
DEPUTY CLERK

SUPREME COURT
STATE OF ARIZONA
201-West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

March 31, 1982

In the Matter of
LAWRENCE J. EVANS, JR.,
Appellee,

vs.

STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and B. L. FARON, Commissioners and Members of the Arizona Corporation Commission,
Appellants.

Supreme Court No. 15936-PR
Court of Appeals No. 1 CA-CIV 5099
Maricopa County No. C-386611

The following action was taken by the Supreme Court of the State of Arizona on March 30, 1982 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 31st day of March, 1982.

S. ALAN COOK, Clerk

By /s/ Anna L. Cates
Chief Deputy Clerk

TO:

Lawrence J. Evans, Jr., Esq., 539 East Erie Drive, Tempe, Arizona 85282
John Acer, Esq., 3003 North Central, Suite 410, Phoenix, Arizona 85012
Hon. B. Michael Dann, Judge, Maricopa County Superior Court, 201 West Jefferson, Phoenix, Arizona 85003

Glen D. Clark, Clerk, Court of Appeals, Division One, West Wing, State Capitol Building, Phoenix, Arizona 85007

Partial index of the RECORD offered by Appellant to Arizona Court of Appeals with which to reconstruct its "lost" records in the matter. (It is unknown by appellant which records were reproduced to "reconstruct" the record below.)

1. LETTER, Arizona Corporation Commission, SUBJECT: Dismissal from State Service, DATED: June 21, 1976, signed by Donald E. Vance, with MINUTES OF EXECUTIVE MEETING OF FRIDAY, JUNE 18, 1976 attached thereto.
2. POSITION ACTION FORM, SUBJECT: Reclassification of Chief Hearing Officer, Grade 24, to Hearing Officer, Grade 22, DATED: June 22, 1976, signed by Sheryl Kanaga.
3. MEMORANDUM, SUBJECT: Discussion with Larry Evans, DATED: June 22, 1978, signed by Donald E. Vance.
4. DEFENSES AGAINST THE SIX REASONS FOR DISMISSAL, prepared by Appellant on June 21, 1976.
5. LETTER, Arizona Corporation Commission, TO: Ms. Sheryl Kanaga, SUBJECT: Receipt of Memo, DATED: June 24, 1976, signed by Donald E. Vance, with copy of Letter to Mr. Evo J. DeConcini, DATED: November 10, 1975, attached thereto.
6. NOTICE OF APPEAL, filed by William P. Mahoney, Jr. on behalf of Lawrence J. Evans Jr., DATED: July 14, 1976.
7. MEMORANDUM, SUBJECT: Documents in Personnel Board file, TO: William P. Mahoney, Jr., FROM: his personal secretary, DATED: July 14, 1976.
8. LETTER, FROM: William P. Mahoney, Jr., TO: Lawrence J. Evans, Jr., SUBJECT: Request that client do the research on "Penalties for Misconduct on the Job" by Alfred Avins, Dean of Delaware Law School, DATED: July 30, 1976, together with the client's research memorandum.
9. MEMORANDUM, Department of Administration, Personnel Division, FROM: James D. Wiley Sr., TO:

William P. Mahoney Jr., SUBJECT: Acknowledgment of letter of appeal, appointment of Warren Levenbaum as Hearing Officer, and setting date of hearing as August 9, 1976.

10. MEMORANDUM, Department of Administration, Personnel Division, FROM: James D. Wiley, Sr., TO: William P. Mahoney Jr., SUBJECT: Continuing date of hearing until August 18, 1976, DATED August 2, 1976.

11. MEMORANDUM, Department of Administration, Personnel Division, FROM: James D. Wiley Sr., TO: William P. Mahoney Jr., SUBJECT: Continuing date of hearing until September 28, 1976, DATED: August 18, 1976.

12. MEMORANDUM, Department of Administration, Personnel Division, FROM: James D. Wiley, Sr., TO: William P. Mahoney Jr., SUBJECT: Continuing date of hearing subject to being reset at the instance of either side.

13. LETTER, FROM: William P. Mahoney, TO: Lawrence J. Evans, Jr., SUBJECT: Proposed settlement agreement, together with Attorney General's opinion, DATED: November 18, 1976.

14. LETTER, FROM: Lawrence J. Evans Jr., TO: William P. Mahoney Jr., SUBJECT: Rejection of settlement agreement, DATED: November 23, 1976.

15. LETTER, FROM: William P. Mahoney, TO: Lawrence J. Evans, Jr., SUBJECT: Proposed additional settlement agreement, DATED: December 2, 1976.

16. LETTER, FROM: Lawrence J. Evans Jr., TO: William P. Mahoney Jr., SUBJECT: Rejection of proposed additional settlement agreement, DATED: December 6, 1976.

17. LETTER, FROM: William P. Mahoney Jr., TO: Lawrence J. Evans Jr., SUBJECT: Desire to withdraw, DATED: December 10, 1976.

18. LETTER, FROM: Lawrence J. Evans Jr., TO: William P. Mahoney Jr., SUBJECT: Desire to withdraw, DATED: December 13, 1976.

19. LETTER, FROM: William P. Mahoney Jr., TO: Lawrence J. Evans Jr., SUBJECT: Desire to withdraw, DATED: December 21, 1976.

20. LETTER, FROM: Robert K. Corbin, TO: Lawrence J. Evans Jr., SUBJECT: Settlement offer by State of Arizona, DATED: January 27, 1977.

21. LETTER, FROM: Lawrence J. Evans Jr., TO: Robert K. Corbin, SUBJECT: Rejection of settlement offer by State of Arizona, DATED: January 31, 1977.

22. LETTER, FROM: Robert K. Corbin, TO: James D. Wiley, Sr., SUBJECT: Requesting that hearing be reset, DATED: February 25, 1977.

23. LETTER, FROM: Timothy B. Ingraham, TO: Robert K. Corbin, SUBJECT: Mr. Evans to have his furniture removed, DATED: February 25, 1977.

24. DRAFT of COMPLAINT FOR SPECIAL ACTION, ORDER TO SHOW CAUSE AND STAY ORDER, DATED: February 25, 1977.

25. MEMORANDUM, Department of Administration, Personnel

26. MOTION TO DISMISS, by respondents, DATED: March 4, 1977.

27. MOTION FOR JUDGMENT ON THE PLEADINGS and/or MOTION FOR SUMMARY JUDGMENT, by appellants, DATED: March 17, 1977.

28. RESPONSE TO RESPONSE TO RESPONDENTS' MOTION TO DISMISS, DATED: March 17, 1977.

29. LETTER, FROM: Robert K. Corbin, TO: James Wiley Sr., Request for nineteen witnesses to be subpoened.

30. MEMORANDUM, Department of Administration, Personnel Division, FROM: James D. Wiley Sr., Setting new hearing date of April 21, 1977, DATED: March 21, 1977.

31. DRAFT of COMPLAINT FOR SPECIAL ACTION, ORDER TO SHOW CAUSE AND STAY ORDER, by appellants, DATED: March 23, 1977.

32. RESPONSE TO MOTION FOR SUMMARY JUDGMENT ON THE PLEADINGS and/or MOTION FOR SUMMARY JUDGMENT, DATED March 31, 1977.

33. MEMORANDUM, Department of Administration, Personnel Division, FROM: James D. Wiley Sr., TO: Robert K. Corbin, SUBJECT: Continuing date of hearing until June 7, 1977, DATED: April 28, 1977.

34. LETTER, FROM: Bob Corbin, TO: James D. Wiley Sr., SUBJECT: Requesting nineteen witnesses be subpoenaed, DATED: April 29, 1977.

35. RESPONDENTS' MOTION TO CONTINUE, DATED: June 3, 1977.

36. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Larry J. Evans, SUBJECT: Continuing date of hearing until July 6, 1977.

37. LETTER, FROM: Bob Corbin, TO: James D. Wiley Sr., SUBJECT: Requesting nineteen witnesses be subpoenaed, DATED: June 10, 1977.

38. LETTER, FROM: Bob Corbin, TO: Larry Evans, SUBJECT: Notification of new date set for hearing, DATED: June 10, 1977.

39. LETTER, FROM: Robert T. Murphy, TO: Robert K. Corbin, SUBJECT: Stipulation for Continuance and Order, DATED: July 5, 1977.

40. STIPULATION FOR CONTINUANCE AND ORDER, by respondents, DATED: July 5, 1977.

41. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: James D. Wiley Sr., SUBJECT: Notification of new date set for hearing, DATED: July 5, 1977.

42. LETTER, FROM: Bob Corbin, TO: Warren Levenbaum, SUBJECT: Forwarding Stipulation for Continuance and Order, DATED: July 7, 1977.

43. LETTER, FROM: Bob Corbin, TO: James D. Wiley Sr., SUBJECT: Request that fifteen witnesses be subpoenaed and four sets of records be subpoenaed duces tecum, DATED: July 7, 1977.

44. SETTLEMENT AGREEMENT, drafted by appellant, DATED: July 15, 1977.

45. LETTER, FROM: Robert T. Murphy, TO: Bob Corbin, SUBJECT: Forwarding list of potential witnesses, DATED: July 23, 1977.

46. SUBPOENA DUCES TECUM to the Custodian of Records, ASU Law School, DATED: July 26, 1977.

47. NOTICE OF DEPOSITION to the Custodian of Records, ASU Law School, DATED: July 26, 1977.

48. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Lawrence J. Evans Jr., SUBJECT: Notification of new date set for hearing, DATED: October 14, 1977.

49. MOTION TO CONTINUE, by respondents, DATED: October 19, 1977.

50. TRANSCRIPT OF HEARING conducted by Hearing Officer Warren G. Levenbaum, DATED: October 19, 1977.

51. MOTION FOR RECONSIDERATION, by respondents, DATED: October 28, 1977.

52. FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND/OR JUDGMENT AND ORDER, by appellant, DATED: October 28, 1977.

53. LETTER, FROM: Bob Corbin, TO: Warren G. Levenbaum, Letter of transmittal, DATED: November 1, 1977.

54. MEMORANDUM, FROM: Department of Administration, Personnel Division, TO: Lawrence J. Evans Jr., SUBJECT: Transmittal of Findings of Fact, Conclusions of Law and Recommendations of Hearing Officer Warren G. Levenbaum, with FINDINGS OF FACT, ORDER AND RECOMMENDATION enclosed, DATED: November 2, 1977.

55. RESPONSE TO RESPONDENT ARIZONA CORPORATION COMMISSION MOTION FOR RECONSIDERATION, by appellants, DATED: November 2, 1977.

56. MODIFICATION OF RECOMMENDATIONS OF HEARING OFFICER, by appellants, DATED: November 7, 1977.

57. LETTER, FROM: Stephen K. Smith, TO: Arizona Department of Administration, Personnel Division, SUBJECT: Request that recommendations of Hearing Officer be rejected and case remanded, DATED: November 8, 1977.

58. RESPONDENT'S WRITTEN OBJECTIONS TO HEARING OFFICER'S FINDINGS OF FACT, ORDER AND RECOMMENDATION and RESPONDENT'S REQUEST THAT THIS MATTER BE REMANDED, ASSIGNED TO ANOTHER HEARING OFFICER AND SET FOR HEARING, DATED: November 8, 1977.

59. MEMORANDUM, Department of Administration, Personnel Division, FROM: Arizona State Personnel Board, TO: Lawrence J. Evans Jr., SUBJECT: Agenda for November 9, 1977 Open Meeting, DATED: November 9, 1977.

60. FINDINGS OF FACT, ORDER AND RECOMMENDATION and ORDER OF THE ARIZONA STATE PERSONNEL BOARD, rejecting recommendations of the Hearing Officer and remanding the appeal back to the Hearing Officer for a hearing, DATED: November 9, 1977.

61. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Lawrence J. Evans Jr., SUBJECT: Letter of transmittal forwarding Personnel Board's decision remanding the appeal back to the Hearing Officer for a hearing, DATED: November 17, 1977.

62. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Lawrence J. Evans Jr., SUBJECT: Notification of rescheduling of hearing, DATED: November 18, 1977.

63. APPEAL FROM ORDER OF ARIZONA STATE PERSONNEL COMMISSION, by appellant, DATED: November 29, 1977.

64. STIPULATION AND ORDER REGARDING SUBMISSION OF WRITTEN BRIEFS AND REQUEST FOR ORAL ARGUMENT, by respondents, DATED: December 7, 1977.

65. STIPULATION AND ORDER FOR CONTINUANCE OF PERSONNEL HEARING, DATED: December 7, 1977.

66. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: Granting 30 days for Opening Brief, 30 days for Answer, and 20 days for Reply; DATED: December 9, 1977.

67. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Wilson D. Palmer, Clerk of Superior Court, SUBJECT: Transmittal of Transcript and of Chronological history of case, DATED: January 4, 1978.

68. LETTER, FROM: Warren G. Levenbaum, TO: Arizona State Personnel, Department of Administration, SUBJECT: Forwarding copy of original copy of Motion to Continue dated October 19, 1977, DATED: January 24, 1978.

69. APPELLANT'S APPEAL BRIEF AS TO FACTS AND LAW, DATED: January 27, 1978.

70. RESPONDENT'S ANSWERING BRIEF ON APPEAL AND MOTION TO DISMISS APPELLANT'S APPEAL, DATED: February 27, 1978.

71. REPLY TO RESPONDENT'S ANSWERING BRIEF ON APPEAL AND ANSWER TO APPELLANT'S MOTION TO DISMISS APPELLANT'S APPEAL, DATED: March 14, 1978.

72. MOTION TO SET APPEAL FOR ORAL ARGUMENT, DATED: March 14, 1978.

73. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: Setting time for oral argument on Appellant's Motion to Set Appeal for Oral Argument, DATED: March 22, 1978.

74. NOTICE OF ASSOCIATION OF CO-COUNSEL, by appellant, DATED: March 31, 1978.

75. SUBPOENA DUCES TECUM, FROM: Appellant, TO: Arizona Corporation Commission, Attention: Executive Secretary, SUBJECT: Personnel files relative to Stuart B. Schoenburg and personnel files relative to Lawrence J. Evans Jr., DATED:

76. SUBPOENA DUCES TECUM, FROM: Appellant, TO: Ernest Garfield, SUBJECT: All documents that might indicate connection with a regulated industry, DATED: July 28, 1978.

77. SUBPOENA DUCES TECUM, FROM: Appellant, TO: B. L. "Bud" Tims, SUBJECT: All documents that might indicate connection with a regulated industry, DATED: July 28. 1978.

78. OBJECTION TO APPELLANT'S SUBPOENA DUCES TECUM, by respondents, DATED: April 10, 1978.

79. MOTION FOR PROTECTIVE ORDER, by respondents, DATED: April 10, 1978.

80. OBJECTION TO MOTION FOR PROTECTIVE ORDER, by appellants, DATED:

81. OBJECTION TO APPELLANT'S SUBPOENA DUCES TECUM, by respondents, DATED: April 10, 1978.

82. LETTER, FROM: Lawrence J. Evans Jr., TO: Robert K. Corbin, SUBJECT: Acting Executive Secretary coming to appellant's home, association of John W. Acer as co-counsel, errors contained within Appellant's Appeal Brief as to Facts and Law, DATED: April 12, 1978.

83. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: Setting oral argument on appeal, DATED: April 19, 1978.

84. LETTER, FROM: Robert K. Corbin, TO: Larry Evans, SUBJECT: Copy of Notice of Deposition and location of subpoena duces tecum, DATED: April 25, 1978.

85. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: The order which has been appealed is not a final order, DATED: May 17, 1978.

86. LETTER, FROM: Bob Corbin, TO: Arizona State Department of Administration, Personnel Division, Personnel Board, SUBJECT: Letter of transmittal of Motion to Grant Appellant's Appeal to Reinstate Appellant to his Former Position of Chief Hearing Officer of the Respondent with Full Back Pay, DATED: June 20, 1978.

87. MOTION TO GRANT APPELLANT'S APPEAL TO REINSTATE APPELLANT TO HIS FORMER POSITION OF CHIEF HEARING OFFICER OF THE RESPONDENT WITH FULL BACK PAY, DATED: June 20, 1978, with two Arizona cases attached which refer to hearing having to be set within 30 days — and no hearing was set in 30 days in this matter.

88. MEMORANDUM, FROM: Department of Administration, Personnel Division, TO: Lawrence J. Evans Jr., SUBJECT: confirming continuance of appeal, DATED: June 29, 1978.

89. RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION DATED JUNE 20, 1978 TO GRANT APPELLANT'S APPEAL, DATED: June 30, 1978.

90. JUDGMENT, prepared by respondents for Superior Court, DATED: July , 1978.

91. OBJECTIONS TO FORM OF JUDGMENT, prepared by appellants, DATED: July 12, 1978.

92. JUDGMENT, prepared by appellant for Superior Court, DATED: July , 1978.

93. RESPONDENT'S MOTION FOR A CHANGE OF HEARING OFFICER, DATED: June 30, 1978.

94. NOTICE OF ASSOCIATION OF CO-COUNSEL, by appellant, DATED: July 3, 1978.

95. LETTER, FROM: Bob Corbin, TO: Arizona State Department of Administration, Personnel Division, SUBJECT: Forwarding Response to Respondent's Opposition to Appellant's Motion Dated June 20, 1978 to Grant Appellant's Appeal, DATED: July 7, 1978.

96. APPELLANT'S RESPONSE TO RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION DATED JUNE 20, 1978 TO GRANT APPELLANT'S APPEAL, DATED: July 7, 1978.

97. PROPOSED FORM OF JUDGMENT, by respondents, DATED: July 11, 1978.

98. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: Order dismissing appellant's appeal without prejudice, DATED: July 13, 1978.

99. REPLY TO APPELLANT'S OBJECTIONS TO FORM OF JUDGMENT, DATED: July 14, 1978.

100. NOTICE OF SERVICE OF FIRST SET OF REQUESTS FOR ADMISSIONS AND NON-UNIFORM INTERROGATORIES, by appellant, DATED: July 20, 1978.

101. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: Formal Judgment, with formal judgment attached, DATED: July 24, 1978.

102. MEMORANDUM, Department of Administration, Per-

sonnel Division, FROM: Richard Rabago, TO: Lawrence J. Evans Jr., SUBJECT: Confirming continuance of appeal and reassigning new Hearing Officer, DATED: July 24, 1978.

103. AFFIDAVIT OF BIAS AND PREJUDICE OF HEARING OFFICER FOR CAUSE, by appellant, DATED: July , 197[illegible]

104. NOTICE OF SERVICE OF SECOND SET OF REQUESTS FOR ADMISSION AND NON-UNIFORM INTERROGATORIES, by appellant, DATED: August 1, 1978.

105. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Lawrence J. Evans Jr., SUBJECT: Continuing date of hearing until August 14, 15, 16, 17, 1978, DATED: August 4, 1978.

106. CROSS-EXAMINATION Questions of Respondent's Witnesses on August 14, 1978. Prepared by Appellant for use by Robert K. Corbin for Opening Statement (rebuttal of Stephen K. Smith) and Cross-Examination of Donald E. Vance and Sheryl Kanaga, DATED: Wednesday, August 3, 1978.

107. LETTER, FROM: Morgan Gust of Gust, Rosenfeld, Divelbess & Henderson, TO: Robert K. Corbin, SUBJECT: Thanking Bob Corbin for releasing Phoenix Newspapers, Inc. from subpoena duces tecum, DATED: August 17, 1978.

108. LETTER, FROM: Morgan Gust of Gust, Rosenfeld, Divelbess & Henderson, TO: Lawrence Evans, SUBJECT: Forwarding copy of August 17, 1978 letter to Bob Corbin, DATED: September 15, 1978.

109. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Lawrence J. Evans Jr., SUBJECT: Continuing date of appeal hearing to September 21, 1978, DATED: September 11, 1978.

110. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: Formal written judgment dismissing the Appeal on grounds of prematurity and without

prejudice signed this date, DATED: September 12, 1978.

111. MINUTE ENTRY, In the Superior Court of Maricopa County, SUBJECT: Formal Judgment, in the form attached, approved September 12, 1978 and entered in accordance with Rule 58(a) on the 13th day of September 1978, DATED: September 15, 1978.

112. Reporter's transcript of proceedings, August 2, 1978.

113. Reporter's transcript of proceedings, August 14, 1978.

114. Reporter's transcript of proceedings, August 16, 1978.

115. Reporter's transcript of proceedings, August 18, 1978.

116. Reporter's transcript of proceedings, August 22, 1978.

117. Reporter's transcript of proceedings, September 7, 1978.

118. Reporter's transcript of proceedings, September 8, 1978.

119. Reporter's transcript of proceedings, September 28, 1978.

120. EXHIBITS Nos. 1-18.

121. EXHIBITS Nos. A-XYZ plus AA, BB, CC.

122. LETTER, FROM: John W. Acer, TO: Arizona State Personnel Board, SUBJECT: typographical errors, omissions and errata to Volumes I through VIII of the transcripts of the evidentiary hearing, together with the Affidavit of G. C. Hodges, typographical errors, omissions and errata to Volumes I through VIII, copy of Reed v. City Council of Roseville case, copy of United Aircraft Corp. v. Lodge 971 of the International Assn. of Machinists case, DATED: October 10, 1978.

123. LETTER, FROM: Stephen K. Smith, TO: Robert K. Corbin, SUBJECT: Letter of transmittal of affidavit, DATED: October 24, 1978.

124. LETTER, FROM: Stephen K. Smith, TO: Arizona State Personnel Board, SUBJECT: Revised affidavit of G. C. Hodges, together with revised affidavit, DATED: October 24, 1978.

125. APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATIONS, DATED: October 25, 1978.

126. Respondents' PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION, DATED; October 25, 1978.

127. RESPONDENTS' BRIEF ON APPEAL, DATED: October 25, 1978.

128. APPELLANT'S ANSWER TO RESPONDENTS' BRIEF ON APPEAL, DATED: October 31, 1978.

129. APPELLANT'S ANSWER TO RESPONDENTS' PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS, DATED: October 31, 1978.

130. RESPONDENTS' REPLY BRIEF ON APPEAL, DATED: November 1, 1978.

131. Appellant's MOTION TO STRIKE RESPONDENTS' REPLY BRIEF ON APPEAL, DATED: November 8, 1978.

132. Respondents' OBJECTION AND MOTION TO EXPUNGE, DATED: November 2, 1978.

133. APPELLANT'S ANSWER TO RESPONDENTS' OBJECTION AND MOTION TO EXPUNGE, DATED: November 8, 1978.

134. RESPONDENT'S ANSWER TO APPELLANT'S MOTION TO STRIKE AND RESPONDENTS' REPLY TO APPELLANT'S ANSWER TO RESPONDENTS' MOTION TO EXPUNGE, DATED: November 15, 1978.

135. APPELLANT'S REPLY TO RESPONDENTS' ANSWER TO APPELLANT'S MOTION TO STRIKE AND APPELLANT'S RESPONSE TO RESPONDENTS' REPLY TO APPELLANT'S ANSWER TO RESPONDENTS' MOTION TO EXPUNGE, DATED: November 20, 1978.

136. RESPONSE TO APPELLANT'S PLEADING OF NOVEMBER 20, 1978, DATED: November 22, 1978.

137. LETTER, FROM: Stephen K. Smith, TO: Mr. John W. Acer, SUBJECT: Returning of check in the amount of $12.50 made out to Robert Bartol, together with the check, DATED: November 22, 1978.

138. APPELLANT'S RESPONSE TO RESPONDENTS' RESPONSE TO APPELLANT'S PLEADING OF NOVEMBER 20, 1978, DATED: December 4, 1978.

139. MEMORANDUM, FROM: Hearing Officer Ellis M. Kopp, TO: Lawrence J. Evans Jr., Appellant, John W. Acer, Robert K. Corbin and Stephen K. Smith, SUBJECT: Conference at 10:00 a.m., Monday, December 18, 1978 re: problems arising out of documents filed, DATED: December 6, 1978.

140. LETTER, FROM: Lawrence J. Evans Jr., TO: Robert K. Corbin and John W. Acer, SUBJECT: Conference called by Hearing Officer Ellis M. Kopp, DATED: December 9, 1978.

141. LETTER, FROM: Bob Corbin, TO: Arizona State Personnel Board, SUBJECT: Letter of transmittal of Motion to Withdraw as Attorney for Appellant and Order, DATED: December 15, 1978.

142. MOTION TO WITHDRAW AS ATTORNEY FOR APPELLANT AND ORDER, from Robert K. Corbin, DATED: December 15, 1978.

143. NOTES on Conference held by Hearing Officer Ellis M. Kopp, Tuesday, December 19, 1978. Notes made up at the request of the FBI Special Agent in Charge of the Arizona Corporation Commission investigation.

144. Hearing Officer Ellis M. Kopp's DECISIONS ON MOTIONS & DOCUMENTS DATED AFTER NOVEMBER 1, 1978, DATED: January 8, 1979.

145. NOTICE OF APPEARANCE AS SPECIAL COUNSEL FOR RESPONDENTS, by Shirley H. Frondorf, DATED: January 8, 1979.

146. NOTICE OF CHANGE OF ASSISTANT ATTORNEY GENERAL, by Stephen K. Smith, DATED: January 16, 1979.

147. MEMORANDUM, Department of Administration, Personnel Division, FROM: Richard Rabago, TO: Lawrence J. Evans Jr., SUBJECT: Transmittal of the Findings of Fact, Conclusions of Law and Recommendation of the Hearing Officer, DATED: January 31, 1979.

148. REPORT INCLUDING FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATIONS & REASONS FOR THE DECISION, by Ellis M. Kopp, Hearing Officer, DATED: January 31, 1979.

149. MOTION FOR EXTENSION OF TIME FOR FILING OBJECTIONS TO RECOMMENDATIONS OF HEARING OFFICER AND ORDER OF THE ARIZONA STATE PERSONNEL BOARD, by respondents, DATED: February 6, 1979 and February 7, 1979.

150. OBJECTIONS TO MOTION FOR EXTENSION OF TIME FOR FILING OF OBJECTIONS TO RECOMMENDATIONS OF HEARING OFFICER, by appellant, DATED: February 7, 1979.

151. MINUTES of the TELEPHONE CONFERENCE CALL EMERGENCY MEETING of the Arizona State Personnel Board, DATED: February 7, 1979.

152. OBJECTION TO HEARING OFFICER'S REPORT INCLUDING FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATIONS & REASONS FOR THE DECISION, by appellant, DATED: February 9, 1979.

153. MEETING NOTICE, FROM: Arizona State Personnel Board, TO: Lawrence J. Evans Jr., DATED: February 14, 1979, with Agenda included.

154. MOTION FOR RECONSIDERATION OF A NUGATORY ACTION TAKEN ON FEBRUARY 7, 1979 AND RECONFIRMED ON FEBRUARY 14, 1979, by appellant, DATED: February 20, 1979.

155. MEETING NOTICE, FROM: Arizona State Personnel Board, TO: Lawrence J. Evans, Jr., DATED: March 6, 1979, with Agenda for the March 14, 1979 meeting included.

156. LETTER, FROM: Shirley H. Frondorf, TO: Ms. Mimi Morron, Chairman, Arizona State Personnel Board, SUBJECT: Request for oral argument and presence of respondents' own court reporter at March 14, 1979 Open Meeting. Also the transmittal of Respondents' Objections to the Hearing Officer's Report, DATED: March 6, 1979.

157. RESPONDENTS' OBJECTIONS TO THE HEARING OFFICER'S REPORT, DATED: March 6, 1979.

158. EXHIBITS selected by Respondents for review by the Personnel Board, DATED: March 6, 1979.

159. LETTER, FROM: Lawrence J. Evans Jr., TO: Ms. Mimi Morron, SUBJECT: Objections to Respondents' request for oral argument at the Open Meeting and transmittal of Motion to Strike, DATED: March 9, 1979.

160. MOTION TO STRIKE, by appellant, DATED: March 12, 1979.

161. TRANSCRIPT, Open Meeting of the Arizona State Personnel Board, DATED: March 14, 1979.

162. AFFIDAVIT, of Everett A. Simmons, re: luncheon conversation with Dr. John R. Carney, DATED: March 24, 1979.

163. AFFIDAVIT, of Dr. John R. Carney, re: luncheon conversation, DATED: March 26, 1979.

164. NEWSPAPER CLIPPING, from The Arizona Republic, Dated: March 24, 1979, re: Ex-Commissioner Ernest E. Garfield requesting Grand Jury records on him, together with Pleadings of Complaint (Libel) in Cases Nos. C-384893 and C-380645.

165. RESPONDENT ARIZONA CORPORATION COMMISSION'S RESPONSE TO APPELLANT'S MOTION TO STRIKE, Dated: March 26, 1979.

166. MEMORANDUM, from private files of Private Investigator George Hudman.

167. RENEWAL OF MOTION TO STRIKE and REPLY TO RESPONDENT CORPORATION COMMISSIONS' RESPONSE TO APPELLANT'S MOTION TO STRIKE and RENEWAL OF APPELLANT'S OBJECTIONS TO HEARING OFFICER'S REPORT, Dated: March 30, 1979.

168. MEETING NOTICE, FROM: Arizona State Personnel Board, TO: Lawrence J. Evans Jr., DATED: April 11, 1979, with Agenda for April 11, 1979 meeting included.

169. TRANSCRIPT, Open Meeting of the Arizona State Personnel Board, DATED: April 11, 1979.

170. LETTER of transmittal, FROM: Arizona State Personnel Board, re: enclosing copy of Board's Decision and Order and specifying grounds for Appeal, and including the actual Decision and Order, DATED: April 11, 1979.

171. LIST, names and addresses of members of the Arizona State Personnel Board.

172. APPEAL FROM ORDER OF ARIZONA STATE PERSONNEL BOARD, Dated: April 19, 1979.

173. AGREEMENT, between Ronald A. Lebowitz, of Linzer, Lebowitz and Rogers and the Attorney General, DATED: September 30, 1977.

174. CORRESPONDENCE from Judge Ed Cummerford, California State Appeals Board.

175. MOTION FOR ORAL ARGUMENT ON APPELLANT'S APPEAL, dated: May 7, 1979 and APPELLANT'S APPEAL BRIEF AS TO FACTS AND LAW, dated May 7, 1979.

176. APPELLANT'S FIRST SUPPLEMENTAL APPEAL AS TO FACTS AND LAW (SYNOPSIS), dated: May , 1979.

177. CIVIL DELAY REDUCTION PROJECT, memorandum from Superior Court of Maricopa County, addressed to John W. Acer, dated: May, 1979. (also, one addressed to Lawrence J. Evans, May 17, 1979)

178. LETTER, TO: Clerk of the Superior Court, FROM: Arizona State Personnel Board, SUBJECT: transmittal of transcripts, exhibits and chronological history of the case, DATED: May 17, 1979.

179. LETTER, TO: Judge Hardy, FROM: Shirley A. Frondorf, re: requesting special dates and times for Respondents to Answer Appellant's Appeal Brief, DATED: May 15, 1979.

180. LETTER, TO: Judge Hardy, FROM: John W. Acer, re: opposing special dates and times for Respondents to Answer Appellant's Appeal Brief, DATED: May 23, 1979.

181. MINUTE ENTRY, by Judge Hardy, establishing special dates and times for Respondents to Answer Appellant's Appeal Brief, DATED: May 23, 1979.

182. AFFIDAVIT OF DEFAULT AND ENTRY OF DEFAULT, by appellants, DATED: May 31, 1979.

183. AGREEMENT, between Shirley H. Frondorf and the Attorney General, DATED: December 27, 1978.

184. MOTION TO DISQUALIFY RESPONDENTS' ATTORNEY, Dated: June 7, 1979.

185. MOTION TO SET ASIDE MINUTE ENTRY OF MAY 23, 1979, Dated: June 7, 1979.

186. RESPONDENTS' BRIEF ON APPEAL, Dated: June 8, 1979.

187. RESPONSE TO APPELLANT'S MOTIONS TO SET ASIDE ENTRY OF MAY 23, 1979, AND TO DISQUALIFY ATTORNEY FOR RESPONDENT, Dated: June 18, 1979.

188. APPELLANT'S CLOSING BRIEF, Dated: June 22, 1979.

189. APPLICATION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE, by E. C. Cummerford, Dated: July, 1979.

190. NOTICE OF REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW, by Appellant, Dated: 24 July 1979.

191. ORAL ARGUMENT, Opening Statement by Appellant.

192. MINUTE ENTRY, denying motion to set aside the minute entry of May 23, 1979, Dated: July 24, 1979.

193. MEMORANDUM OPINION AND ORDER, by the Honorable Charles L. Hardy, Dated: July 31, 1979.

194. MINUTE ENTRY, reversing order of Arizona State Personnel Board, remanding for purpose of determining position and back pay, and ordering counsel for Appellant to prepare formal judgment.

195. Proposed JUDGMENT, prepared by Appellant and lodged with the Court, Dated: August 6, 1979.

196. MINUTE ENTRY, acknowledgment by the Court that the proposed Judgment was lodged, Dated: August 6, 1979.

197. OBJECTIONS TO FORM OF JUDGMENT, by Respondents, dated: August 14, 1979.

198. APPELLANT'S REPLY TO RESPONDENTS OBJECTIONS TO FORM OF JUDGMENT, Dated: August 20. 1979.

199. AFFIDAVIT OF LAWRENCE J. EVANS JR., Dated: August 20, 1979.

200. STIPULATION that respondents could temporarily remove the transcripts of the personnel hearing before Mr. Ellis M. Kopp, August - October, 1978.

201. RESPONDENTS' MOTION PURSUANT TO RULE 59(a), Dated: August 28, 1979.

202. MINUTE ENTRY, Sustaining Respondents objections to form of Judgment, noticing formal written judgment signed, settled and approved, and setting oral argument for October 17, 1979 on Respondents' Motion pursuant to Rule 59(a), Dated: August 29, 1979.

203. Final formal JUDGMENT, signed by the Honorable Charles L. Hardy, Judge of the Superior Court, Dated: August 29, 1979.

204. NOTICE OF APPEAL, by respondents, from the memorandum opinion and order made and entered on July 31, 1979 by Judge Hardy, Dated: August 30, 1979.

205. MOTION TO STRIKE RESPONDENTS' NOTICE OF APPEAL (or in the alternative) MOTION TO DISMISS RESPONDENTS' NOTICE OF APPEAL, by Appellant, Dated: August 31, 1979.

206. MOTION TO STRIKE RESPONDENTS' MOTION PURSUANT TO RULE 59(a), by Appellant, Dated: August 31, 1979.

207. NOTICE OF APPEARANCE, law firm of Sundberg & Mousel, as special counsel for the Arizona State Personnel Board, Dated: August 30, 1979 (received in the mail on September 1, 1979).

208. Form letter of transmittal from the Court of Appeals, State of Arizona, with information of availability of the Accelerated Civil Appeals (Procedure "A").

209. MINUTE ENTRY, setting oral argument on Appellant's Motion to Strike Respondents' Notice of Appeal and Motion to Strike Respondents' Motion Pursuant to Rule 59 (a), Dated: September 4, 1979.

210. MOTION TO SUSPEND APPEAL AND REVEST JURISDICTION IN THE SUPERIOR COURT PENDING DISPOSITION OF PENDING MOTIONS, OR IN THE

ALTERNATIVE, MOTION TO DISMISS APPEAL, Dated: September 7, 1979.

211. MINUTE ENTRY, forwarding FORMAL JUDGMENT approved on August 29, 1979 and entered on August 30, 1979, dated: September 10, 1979.

212. MINUTE ENTRY, resetting hearing on Respondents' Motion Pursuant to Rule 59(a) to October 15, 1979, dated: September 14, 1979.

213. MINUTE ENTRY, holding that Superior Court has no jurisdiction and vacating hearing on Respondents' Motions pending a ruling by the Arizona Court of Appeals, dated: September 27, 1979.

214. NOTICE OF APPEAL, dated September 28, 1979.

215. MOTION IN OPPOSITION TO MOTION TO SUSPEND APPEAL AND REVEST JURISDICTION IN THE SUPERIOR COURT PENDING DISPOSITION OF PENDING MOTIONS, OR IN THE ALTERNATIVE, MOTION TO DISMISS, dated: October 1, 1979.

216. MOTION TO DISMISS DEFECTIVE AND FRIVOLOUS NOTICE OF APPEAL, dated: October 4, 1979.

217. INDEX of record forwarded by Maricopa County Clerk, Appeals Section, to Court of Appeals, undated.

218. APPELLANTS' REPLY TO APPELLEE'S MOTION OF OCTOBER 1, 1979, dated: October 9, 1979.

219. LETTER, from Clerk of the Court of Appeals, directing the opening brief to be due within thirty days from the 10th of October, 1979, dated: October 10, 1979.

220. LETTER, from the Clerk of the Court of Appeals, entitled AMENDED NOTICE and directing the opening brief to be due within thirty days from the 10th of October, 1979, dated: October 11, 1979.

221. MINUTE ENTRY, vacating hearing on Motion for New Trial pending determination of whether appeal is to be suspended, dated: October 11, 1979.

222. APPELLEE'S OBJECTIONS TO APPELLANTS' REPLY TO APPELLEE'S MOTION OF OCTOBER 1, 1979 AS BEING A REPLY IN CONTRAVENTION OF A.R.S. §32-263(4), dated: October 15, 1979.

223. RESPONSE TO APPELLEE'S MOTION TO DISMISS FRIVOLOUS NOTICE OF APPEAL, dated: October 16, 1979.

224. ORDER of the Court of Appeals, Dismissing Appellants' first defective Notice of Appeal, dated: October 16, 1979.

225. MINUTE ENTRY, ordering setting hearing of all pending Motions for 8:30 a.m. on November 16, 1979 in Superior Court, dated: October 17, 1979.

226. MOTION TO SUSPEND APPEAL AND REVEST JURISDICTION IN THE SUPERIOR COURT PENDING DISPOSITION OF PENDING MOTIONS, dated: October 30, 1979.

227. MOTION TO VACATE MINUTE ENTRIES OF OCTOBER 11 AND OCTOBER 17, 1979 FOR LACK OF JURISDICTION AND (in the alternative) MOTION FOR CONTINUANCE, OR SHORTENING OF TIME, dated: November 5, 1979.

228. MOTION IN OPPOSITION TO MOTION TO SUSPEND APPEAL AND REVEST JURISDICTION IN THE SUPERIOR COURT PENDING DISPOSITION OF PENDING MOTIONS (erroneously filed by Appellants as "undocketed").

229. MOTION FOR DISMISSAL OF APPEAL DATED September 28, 1979 UNDER PROVISIONS OF ARCAP 15(c), dated: November , 1979.

NOTE: The above was never filed because it was captioned under NO. 1-CA-CIV 5020 and the appellants pulled an end run and reappealed under NO. 1-CA-CIV 5099.

230. MOTION FOR DISMISSAL OF NOTICE OF APPEAL DATED September 28, 1979 and MOTION TO DISMISS APPELLANTS' MOTION TO SUSPEND APPEAL AND REVEST JURISDICTION IN THE SUPERIOR COURT PENDING DISPOSITION OF PENDING MOTIONS, dated: November 6, 1979.

231. LETTER from Glen D. Clark, Chief Deputy Clerk, Court of Appeals, State of Arizona, to Wilson D. Palmer, Clerk, Maricopa County Superior Court, enclosing Certified Copy of "ORDER" dismissing appeal, dated: November 6, 1979.

232. LETTER from Glen D. Clark (signed by Jean W. Howard), Chief Deputy Clerk, Court of Appeals, State of Arizona, to Frondorf and Evans, giving 30 days for opening brief on their "Motion, dated: November 6, 1979.

233. INDEX of documents forwarded to Court of Appeals by the Appeals Clerk, Maricopa County Superior Court in Case No. C-386611, undated.

234. LETTER from Court of Appeals, Division One, advising of the Accelerated Civil Appeals (Procedure B), dated: November 6, 1979.

235. RESPONSE TO APPELLANT'S MOTION TO VACATE MINUTE ENTRIES OF OCTOBER 11, 1979, AND OCTOBER, 17, 1979, dated: November 15, 1979.

236. MINUTE ORDER, Superior Court of Maricopa County, State of Arizona, continuing hearing until December 14, 1979, dated November 14, 1979.

237. REPLY TO APPELLEE'S "MOTION IN OPPOSITION" FILED NOVEMBER 5, 1979, dated November 15, 1979.

238. RESPONSE TO APPELLEE'S MOTION FOR DISMISSAL OF NOTICE OF APPEAL AND MOTION TO DISMISS APPELLANTS' MOTION TO SUSPEND APPEAL, dated November 16, 1979.

239. RESPONSE TO APPELLANTS' REPLY TO APPELLEE'S MOTION IN OPPOSITION FILED NOVEMBER 5, 1979, dated November 20, 1979.

240. REPLY TO RESPONSE TO APPELLEE'S MOTION FOR DISMISSAL OF NOTICE OF APPEAL AND MOTION TO DISMISS APPELLANTS' MOTION TO SUSPEND APPEAL, dated November 29, 1979.

241. REPLY TO RESPONDENTS' RESPONSE TO APPELLANTS' MOTION TO VACATE MINUTE ENTRIES OF OCTOBER 11, 1979 AND OCTOBER 17, 1979, dated November 20, 1979.

242. LETTER, from Sundberg and Mousel, requesting copies of briefs, dated November 26, 1979.

243. MOTION FOR EXTENSION OF TIME TO FILE BRIEF (PROCEDURAL ORDER), dated December 4, 1979.

244. MOTION IN OPPOSITION TO APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF (Appellee's Procedural Response to Appellant's Motion) dated December 6, 1979.

245. REPORTER'S TRANSCRIPT OF PROCEEDINGS, William E. Critchley v. Arizona Corporation Commission, dated November 13, 1979.

246. MINUTE ORDER, Superior Court of Maricopa County, State of Arizona, setting hearing on Motion to Vacate, dated December 14, 1979.

247. MOTION FOR EXTENSION OF TIME TO FILE BRIEF (PROCEDURAL ORDER), dated December 18, 1979.

248. MOTION IN OPPOSITION TO APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF, dated December 18, 1979 (PROCEDURAL ORDER) and MOTION FOR DISMISSAL OF NOTICE OF APPEAL, dated September 28, 1979, UNDER PROVISIONS OF ARCAP 15(c), dated December 21, 1979.

249. APPELLANTS' OPENING BRIEF, dated January 21, 1980.

250. APPELLEE'S ANSWERING BRIEF, dated February 4, 1980.

251. APPELLANTS' REPLY BRIEF, dated February 19, 1980.

252. REQUEST FOR ORAL ARGUMENT, dated February 25, 1980.

253. MINUTE ORDER, Superior Court of Maricopa County, State of Arizona, vacating status conference set for June 17, 1981, dated May 22, 1981.

254. LETTER of transmittal of Motion to Strike to Judge Eino M. Jacobson and LETTER of transmittal of Motion to Strike to Judge Laurence T. Wren, both dated September 22, 1981.

255. MOTION TO STRIKE, dated September 22, 1981.

256. NOTICE OF ORAL ARGUMENT in Court of Appeals set for October 5, 1981, dated September 9, 1981.

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE
West Wing, State Capitol Building
1700 West Washington Street
Phoenix, Arizona 85007

March 11, 1982

Mr. S. Alan Cook, Clerk
Arizona Supreme Court
201 South West Wing, Capitol Building
Phoenix, Arizona 85007

Dear Sir:

RE: 1 CA-CIV 5099
EVANS v. STATE OF ARIZONA, et al.
MARICOPA C-386611

The Court's OPINION was filed on 2nd day of February 1982.

The motion for rehearing was denied on the 8th day of March 1982.

A timely petition for review was filed on the 10th day of March 1982. The record is transmitted to your Court as follows:

X Petition for Review (7) (6)
X ORDER denying motion for rehearing (6) (5)
X RESPONSE/OBJECTION to motion for rehearing (6)
X Motion for rehearing (6) (5) and MOTION TO STRIKE
X Briefs (Opening, Answering,/Reply) (6 each) ORIGINAL, Sets 1, 2, 3, 4 and 5
X Original Clipboard
X Instruments
X Minute Entries
____ Certified Claims File
____ Depositions (
____ Reporter's Transcript (
X Exhibits (being held in our Court pending disposition of Arizona Supreme Court).

GLEN D. CLARK
By
/s/ M S Hume
Deputy Clerk

Enclosures (as noted)
c: Mr. Lawrence J. Evans, Jr.
Mr. John W. Acer
Mr. Ronald A. Lebowitz/Ms. Shirley H. Frondorf
Mr. Mack T. Jones

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE
West Wing, State Capitol Building
1700 West Washington Street
Phoenix, Arizona 85007

April 6, 1982

Mr. Wilson D. Palmer, Clerk
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, Arizona 85003

Dear Sir:

RE: 1 CA-CIV 5099
EVANS v. STATE OF ARIZONA,
et. al.
MARICOPA C-386611

The following are enclosed in the above-entitled and numbered cause:

_X_ Original Mandate
____ Certified Copy of "ORDER" and "MANDATE"
____ Certified Copy of "ORDER" dismissing appeal
____ Certified Copy of Stipulation and Order dismissing appeal.
_X_ Copy of Opinion/Memorandum Decision.
_X_ Instruments
_X_ Minute Entries
____ Depositions (____ Vols.,
_X_ Reporter's Transcripts (eight Vols., dated, 9/8/78; 9/21/78; 9/7/78; 8/22/78; 8/16/78; 8/18/78; 8/14/78; 8/2/78);
_X_ Interrogatories (contained in a brown binder).
_X_ Exhibits (contained in three manila folders).

GLEN D. CLARK, CLERK
By
/s/ M S Hume
Deputy Clerk

Enclosures (as noted)

c: Mr. Lawrence J. Evans, Jr., Tempe

Mr. John W. Acer
Mr. Ronald A. Lebowitz/Ms. Shirley H. Frondorf
Mr. Mack T. Jones
The Honorable B. Michael Dann, Judge

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of LAWRENCE J. EVANS, JR., Appellee, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Appellants.	1 CA-CIV 5099 DEPARTMENT B

MANDATE

TO: The Honorable Superior Court for MARICOPA County, Arizona in relation to Cause No. C-386611.

GREETING:

The above cause was presented in your Court and was brought before Division One of the Court of Appeals of the State of Arizona in the manner prescribed by law. This Court rendered its opinion and casued the same to be filed on the 2nd day of February, 1982.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order dated the 30th day of March, 1982, the Arizona Supreme Court denied the petition for review, Supreme Court No. 15936-PR.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the opinion of this Court, a copy of the opinion being attached hereto.

WITNESS, THE HONORABLE EINO M. JACOBSON, Presiding Judge, Dapartment B, Division One of the Court of

Appeals to the State of Arizona, this 6th day of April, 1982.

(SEAL)

GLEN D. CLARK, CLERK
By
/s/ [name illegible]
Deputy Clerk

The original of the foregoing MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, this 6th day of April, 1982. A copy of the MANDATE was mailed on said day to each party appearing or to the attorneys of record.

GLEN D. CLARK, CLERK
By
/s/ [name illegible]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

In the Matter of LAWRENCE J. EVANS, JR., Appellant/Appellee, vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Appellee/Appellant.	)	No. C-386611 JUDGMENT

This Court having received the MANDATE of the Arizona Court of Appeals, 1 CA-CIV 5099, Department B, dated April 6, 1982, IT IS ORDERED as follows:

1. The Final Judgment of this Court in this matter, rendered on August 29, 1979, is VACATED.

2. The Opinion and Order and Decision of the Arizona State Personnel Board of April 11, 1979 is AFFIRMED.

DATED this 21st day of April, 1982.

B. MICHAEL DANN, Judge

Copy of the foregoing delivered/mailed
to the following on 21st day of April, 1982.

SHIRLEY H. FRONDORF
Lebowitz & Frondorf
141 East Palm Lane - Suite 111
Phoenix, Arizona 85004

The Honorable B. Michael Dann, Judge
Maricopa County Superior Court
101 West Jefferson Street
Phoenix, Arizona 85003

COURT OF APPEALS
Division One
Department B (1 CA-CIV 5099)
1700 West Washington Street
Phoenix, Arizona 85007

John W. Acer, Esq.
3033 North Central Avenue – #410
Phoenix, Arizona 85012

/s/ Lawrence J. Evans Jr.

In the Supreme Court of the
State of Arizona

In the Matter of LAWRENCE J. EVANS, JR., Appellant vs. STATE OF ARIZONA, EX REL; ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission, Appellee.	1 CA-CIV 5099 DEPARTMENT B Maricopa County Superior Court No. C-386611 No. _____

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that LAWRENCE J. EVANS JR., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Arizona. Motion for Rehearing denied, March 8, 1982. Petition for Review by the Arizona Supreme Court denied, March 30, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ Lawrence J. Evans Jr.
LAWRENCE J. EVANS JR.
539 East Erie Drive
Tempe, Arizona 85282
(602/966-4392)

PROOF OF SERVICE:

Copy delivered/mailed this 10th day of April, 1982.

/s/ Lawrence J. Evans Jr.

(FILED: April 12, 1982)

Copy of the foregoing mailed/delivered
this 10th day of April, 1982, to:

SHIRLEY H. FRONDORF
Lebowitz & Frondorf
141 East Palm Lane
Suite 111
Phoenix, Arizona 85004

Court of Appeals
Division One
Department B (1 CA-CIV 5099)
West Wing, State Capitol Building
1700 West Washington Street
Phoenix, Arizona 85007

John W. Acer, Esq.
Attorney at Law
3033 North Central Avenue
Suite 410
Phoenix, Arizona 85012

The Honorable B. Michael Dann, Judge
Maricopa County Superior Court
East Court Building
101 West Jefferson Street
Phoenix, Arizona 85003

/s/ Lawrence J. Evans Jr.

Office - Supreme Court, U.S.
FILED
AUG 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2375

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

MOTION TO DISMISS

Ronald A. Lebowitz
Shirley H. Frondorf
LEBOWITZ & FRONDORF
141 East Palm Lane
Suite 111
Phoenix, Arizona 85004

Counsel for Appellees

No. 81-2375

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

MOTION TO DISMISS

Ronald A. Lebowitz
Shirley H. Frondorf
LEBOWITZ & FRONDORF
141 East Palm Lane
Suite 111
Phoenix, Arizona 85004

Counsel for Appellees

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I. OBJECT

Pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States, State of Arizona ex rel. Arizona Corporation Commission, Ernest Garfield, B. L. "Bud" Tims, and Al Faron, Commissioners and members of the Arizona Corporation Commission, appellees herein, move this Court to dismiss the appeal on the grounds set forth below.

The basis on which appellant requests review is so imprecisely stated and defined in appellant's Jurisdictional Statement that appellees have great difficulty in responding in an intelligible and reasoned manner based on specific questions of federal law. A recitation of the procedural history of this case in the state courts establishes that appellant's federal claims, whatever appellant may perceive those claims to be, are without merit, and are fictitious and frivolous.

II. NATURE OF THE CASE

The State of Arizona maintains a merit system which governs conditions under which a non-probationary state employee is subject to discipline or to dismissal from state service. The statutory scheme provides procedure for appeal for the employee so affected. Ariz. Rev. Stat. §41-785. Under the statutory scheme, the Arizona Personnel Board is delegated the power to hear appeals and to promulgate rules and regulations relating to personnel matters. Ariz. Rev. Stat. §41-782.

Appellant was dismissed from his position as a hearing officer for the Arizona Corporation Commission on June 21, 1976, on the basis of insubordination, willful disobedience, and improper attitude, each of which, under Ariz. Rev. Stat. §41-770(6), (14), and (4), constitutes cause for dismissal. Appellant appealed his dismissal to

the Arizona Personnel Board, and a hearing was conducted before a hearing officer who issued findings and recommended that appellee be reinstated. The State Personnel Board ultimately rejected the findings of the hearing officer, and upheld the dismissal of appellant.

Appellant then sought review of the Personnel Board in the Superior Court of Maricopa County, as provided for by Ariz. Rev. Stat. §41-785(D). After briefing and oral argument, the Superior Court reversed the decision of the Personnel Board and ordered appellant reinstated.

The next layer of judicial review was to the Arizona Court of Appeals under Ariz. Rev. Stat. §41-785(F). There, the judgment of the Superior Court was reversed and the Personnel Board's decision upholding appellant's dismissal was reinstated. In its opinion, the Court of Appeals held that

there was reasonable evidence to support appellant's dismissal, that the Superior Court's decision to override the Personnel Board's determination on issues of fact was error, and that the State Personnel Board, under applicable state law, is the final fact finder with full authority to reject the recommendation of its own hearing officer, in whole or in part, since the hearing officer merely functions as an advisor or as a convenience for the Personnel Board itself. Evans v. State of Arizona ex rel. Arizona Corp. Com'n, ____ Ariz. ____, 643 P.2d 14 (Ariz. App. 1982).

Finally, discretionary review of the Court of Appeals decision was rejected by the Arizona Supreme Court. This appeal to the United States Supreme Court followed.

III. REASONS WHY THIS COURT'S JURISDICTION HAS NOT BEEN PROPERLY INVOKED

While appellant has characterized the jurisdiction of this Court as based upon 28 U.S.C. §1257(2), appellant has never drawn into question the validity of a statute of the State of Arizona; nor even identified the state statute upon which this Court's purported jurisdiction must rest. Appellant's concerns are not directed at the constitutionality of any state statute encompassed in the Arizona merit system for state employees, but are based upon appellant's belief that the Arizona State Personnel Board and the court of last resort in that state did not reach the right decision, and, thus, due process was violated.

The twenty alleged federal questions raised by appellant in his Jurisdictional Statement are so numerous, generalized, and vague that appellees cannot reasonably ascer-

tain the specific questions which are required to be answered. However, the underlying validity or repugnance to the constitution of any state statute does not appear in that statement. The twenty "Questions Presented" in appellant's Jurisdictional Statement appear to claim that the Arizona Court of Appeals should not have reversed the lower court, and that appellant is somehow entitled to another layer of judicial review of his dismissal from state employment, this time in the United States Supreme Court. For example, appellant's Questions 1, 2, and 5 involve the refusal of the Arizona Supreme Court and the Arizona Court of Appeals to consider appellant's "federal claims" (although appellant fails to identify the "federal claim or claims" purportedly put in issue and ignored).

Questions 3 and 17 assert that the state appellate court did not cite proper authority in its opinion. Questions 6, 7, and 16 claim that there was an incomplete appellate record. Questions 8 and 9 deal with questions of evidence admitted in the administrative personnel hearing; Questions 13 and 14 claim that the regulations promulgated by the State Personnel Board, by which the Board may delegate certain functions to a hearing officer, exceeded that Board's statutory power; Questions 18 and 19 are generally unintelligible but may be characterized as attacking the state court's interpretation of state statutes which governed appellant's dismissal under the merit system. Finally, in Question 20, appellant claims that his dismissal for "improper attitude" purportedly raises an issue under the First Amendment.

To the best of appellees' ability to ascertain, the issues having any semblance of federal questions (and assuming, arguendo, that issues had been identified and ruled upon as such in the state court) are:

(1) Whether the Arizona Court of Appeals could interpret the scope of administrative review under Ariz. Rev. Stat. §41-785(D) as "reasonable evidence" in support of the challenged disciplinary action (as opposed to "substantial evidence");

(2) Whether, under the statutes and regulations governing the state merit system, the State Personnel Board could reach a different decision than that recommended by the hearing officer designated by the Personnel Board to conduct the administrative hearing;

(3) Whether the term "improper attitude" pursuant to Ariz. Rev. Stat.

§41-770(4) constitutes a constitutionally permissible basis for dismissal from state employment.

None of these issues implicate a federal question under 28 U.S.C. §1257(2); or, even assuming, arguendo, that these claims implicate the Constitution of the United States, they do not present a substantial federal question sufficient for this Court's plenary consideration. Finally, none were sufficiently identified and presented as a federal issue in the state court, and, as such, was not necessarily decided by the Arizona Court of Appeals when it affirmed appellant's dismissal from state employment. Finally, even speculating what appellant's purported federal claim or claims could have been, it is clear that appellant's dismissal from state service rests on an adequate non-federal basis.

A. The Scope of Administrative Review Under Ariz. Rev. Stat. §41-785(D)(2), As Applied by the State Court, Is Not a Federal Issue.

Ariz. Rev. Stat. §41-785(D) reads, in pertinent part, as follows:

> Within thirty days after the recording of the order and the mailing thereof, the employee may appeal to the superior court of the county of residence on one or more of the following grounds, that the order was:
>
> 1. Founded on or contained error or law which shall specifically include error of construction or application of any pertinent rules.
>
> 2. Unsupported by any evidence as disclosed by the entire record.
>
> 3. Materially affected by unlawful procedure.
>
> 4. Based on violation of any constitutional provision.
>
> 5. Arbitrary or capricious.

Appellant argues that the application of a standard of "reasonable evidence" by the Court of Appeals, Division One, in uphold-

ing the dismissal of appellant from state employment was improper. Rather, appellant asserts that the appropriate standard for the Superor Court to apply in this instance should have been "substantial evidence." Unfortunately, none of the authorities cited by appellant in which the term "substantial evidence" is applied is based upon a federal constitutional provision, but is based upon judicial interpretation and/or the direct wording of particular statutes such as the Administrative Review Act.

The Arizona Court of Appeals has interpreted the evidentiary standard to be used in administrative actions under the relevant statute (Ariz. Rev. Stat. §41-785(D)) as being "reasonable evidence." That standard for judicial review of an administrative decision under the state statute was based upon the wording

of the statute, and upon prior interpretation of similar statutes by the Arizona appellate court. See Board of Education of Tempe Union High School v. Lammle, 122 Ariz. 522, 526, 596 P.2d 48, 52 (App. 1979).

Thus, the Court of Appeals' decision to apply a "reasonable evidence" standard of review was based upon its own construction of a state statute and upon the rule of stare decisis. While appellant may disagree with that evidentiary standard as applied to dismissal of an employee from state service, appellant has not asserted or identified any provision of the Constitution, or any authority with constitutional underpinnings, that would make the application of such a standard repugnant. This Court has repeatedly held that it will not substitute its judgment for that of a state court in an analysis of evi-

dence, or in weighing of evidence relied upon to support findings of a state court. Garner v. Louisiana, 368 U.S. 157, 166 (1961). The Due Process Clause of the Fourteenth Amendment does not, in and of itself, give jurisdiction to this Court to review purported errors of law, or errors in state procedure allegedly committed by a state court performing in matters that are non-federal in character. McDonald v. Oregon Railroad & Navigation Co., 233 U.S. 665, 669-670 (1914). The standard of sufficiency of the evidence, and the operation of the state merit system to the facts of appellant's conduct are matters uniquely non-federal. All of appellant's claims involving the state court's purported mis-application of state law are non-recognizable under 28 U.S.C. §1257(2), or under the provision for writ of certiorari to this Court.

B. The State Court's Ruling That the State Personnel Board is the Ultimate Fact-Finder and May Reverse the Findings of Its Hearing Officer Does Not Constitute a Federal Issue.

Throughout his jurisdictional statement, appellant refers to the hearing officer for the Personnel Board as "the trier of fact." Appellant expressly and by inference asserts that the Arizona Personnel Board is without power to modify or disregard findings of fact, conclusions of law, and recommendations made by its hearing officers. Appellant seems to assert that delegation of the evidence gathering function to the hearing officer through state regulation and state statute deprives the Personnel Board of its status as fact-finder and decision-maker.

The thrust of appellant's argument is that the Arizona Court of Appeals and the Arizona Supreme Court could not interpret

Ariz. Rev. Stat. §§41-782.01(C) and 41-785(B) as authorizing delegation of the evidence gathering task to a Personnel Board hearing officer without also relinquishing the Personnel Board's right to be the decision-maker in the first instance. In addition, appellant argues that the rules and regulations adopted by the personnel board governing the operation of personnel hearings and the delegation of evidence gathering tasks to the hearing officer cannot be used to support the Court of Appeals' opinion.

Interpretation of state statutes and state agency regulation is reserved to the appellate courts of the state, not to the federal courts. As such, appellant's complaints do not give rise to a colorable constitutional question, since the state courts of Arizona have held, in the present case, that the statutes and the regulations adopted by the Personnel Board authorize

delegation of the evidence gathering task to a hearing officer; and that such a delegation is not a relinquishment of the State Personnel Board's authority to make the ultimate findings of fact, conclusions of law, and order of dismissal.

Removing the state law issues, the only possible federal issue that could have been raised is that the delegation of power to a hearing officer authorized by Ariz. Rev. Stat. §§41-782.01(C) and 41-785(B) is in violation of constitutional principles, specifically, the Fourteenth Amendment guarantee of due process.

Appellant did not delineate or identify the issue in the state court as based on the federal Constitution or federal law. This lack, in itself, precludes the jurisdiction of this Court. Appellant's contention appears to be that, if the State Personnel Board delegates an administrative

hearing to a hearing officer, the Board subsequently cannot draw different conclusions of law and appraise the evidence differently than did its hearing officer, despite State Personnel Board Regulation R-2-5-33(13), which gives the Board broad power to amend or reject the hearing officer's report. Appellant appears to believe that a hearing officer must be the ultimate fact-finder, and that a commission or board cannot reverse his findings. Even if appellant had clearly defined this as a federal constitutional issue in the state court (which he did not), that issue has been resolved. It is clear that such legislative or statutory delegation to a hearing officer is constitutionally permissible. See, e.g., United States v. Raddatz, 447 U.S. 667, 680 (1980); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Morgan v. United States, 298 U.S. 468 (1936); Utica Mutual Insurance

Co. v. Vincent, 375 F.2d 129, 132 (2d Cir.), cert. denied, 389 U.S. 839 (1967). The lack of substantiality of a federal question is thus apparent, since the previous decisions of this Court have foreclosed the subject.

C. "Improper Attitude" as a Statutory Reason for Discharge Was Never Identified or Litigated as a Federal Issue in the State Court. In Any Event, the Case is Governed by Arnett v. Kennedy, 416 U.S. 134 (1974).

Appellant obliquely asserts that the term "improper attitude" cannot constitute a reason for discharge from state employment because the term is constitutionally invalid. Appellant's rationale is not only unintelligible, but the issue (assuming it to be that the term "improper attitude" is overbroad and void for vagueness) is barred as justification for this Court's jurisdiction under 28 U.S.C. §1257(2). Appellant failed to bring this newly

asserted federal claim to the attention of the state courts with fair precision, and did not, for example, raise this issue in his claim of error to the Superior Court of Maricopa County. That court's off-hand holding that "improper attitude" was an "amorphous term" that was not definite or certain under Arizona law was made sua sponte by the Superior Court judge, and without briefing by any party.

The highest court of the state failed to pass on appellant's "federal question" and overruled the Superior Court based strictly on its interpretation of state law and authority.

When the highest state court has failed to pass on the purported federal question, it is assumed that the omission was due to the lack of the issue's proper presentation in the state court, unless the contrary can be shown. Street v. New

York, 394 U.S. 576, 582 (1969); Webb v. Webb, ____ U.S. ____, 101 S. Ct. 1889 (1981). The constitutional issues that appellant obliquely refers to in his Jurisdictional Statement in respect to the term "improper attitude" have never been sufficiently or properly raised in state court.

In any event, even if appellant had raised a challenge to the term "improper attitude" as repugnant to the United States Constitution, such a challenge is foreclosed by Arnett v. Kennedy, 416 U.S. 134 (1974), which interpreted the language "such cause as will promote the efficiency of the service" in 5 U.S.C. §7513(a). See, e.g., Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968), modified 425 F.2d 469, aff'd en banc 425 F.2d 472 (D.C. Cir. 1969); Phillips v. Adult Probation Department of City and County of San Francisco,

491 F.2d 951 (9th Cir. 1974); Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974).

Similarly, the record does not reflect that the constitutionality of appellant's discharge under Ariz. Rev. Stat. §41-770(4), as construed under the First Amendment, was ever presented to the Arizona Court of Appeals, or to the Arizona Supreme Court. The final state court interpretation of "improper attitude" was based solely on state law and state authority.

> Further, the judge did not accept "improper attitude" as a cause justifying removal, stating that the term was too indefinite and uncertain to constitute a cause for dismissal. The judge's decision to overrule the Board's determinations on these issues, where there was "reasonable evidence" in the record to sustain them, constituted error. Neither the trial court nor this Court may ignore A.R.S. §41-770, ... absent a showing that the statute is arbitrary in nature having no substantial relation-

> ship to the end sought to be accomplished. See Civil Service Board of City of Phoenix v. Warren, 74 Ariz. 88, 244 P.2d 1157 (1952). Evans v. State of Arizona ex rel. Corp. Com'n, supra, 643 P.2d at 19.

The issue before the State Personnel Board and the state courts was never whether appellant's conduct and speech were protected expression, but whether an employee in appellant's position would have fair warning that his openly expressed attitudes of misuse, criticism, and hostility were inconsistent with a workable employee relationship and were highly disruptive to the agency. See Evans v. Arizona ex rel. Corp. Com'n, supra, 643 P.2d at 18.

Such critical expression which undermines the effectiveness of the agency crosses the line from protected speech to disruptive attitude. Arnett v. Kennedy, supra, 416 U.S. at 162; Pickering v. Board of Education, 391 U.S. 563 (1968); Smalley

v. City of Eatonville, 640 F.2d 765 (5th Cir. 1981); Sprague v. Fitzpatrick, 546 F.2d 560(3d Cir. 1976), cert. denied 431 U.S. 937 (1977); Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied 430 U.S. 931 (1977); Roseman v. Indiana University, 520 F.2d 1364 (3d Cir.), cert. denied 424 U.S. 921 (1975); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), cert. denied 411 U.S. 972 (1973).

Since appellant's purported First Amendment claim was never raised or identified as such in the state court, the test of Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), was never applied by the lower court -- i.e., to determine whether appellant would have been discharged from state employment in the absence of the protected speech or conduct.

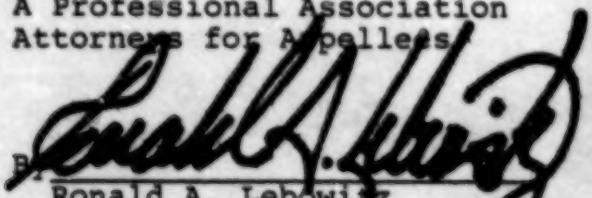
All of these factors, in addition to the fact that appellant's discharge rests on adequate non-federal grounds (for insubordination and willful disobedience) deprive appellant of the right to claim jurisdiction of this Court pursuant to 28 U.S.C. §1257(2), or any other ground.

CONCLUSION

None of the jurisdictional prerequisites are present or even properly identified for this Court. Appellant has sought to bring an unwarranted appeal, and this appeal should be dismissed for lack of jurisdiction, with costs assessed against appellant.

Respectfully submitted this 10th day of August, 1982.

LEBOWITZ & FRONDORF
A Professional Association
Attorneys for Appellees

By 
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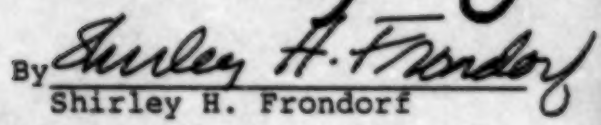
By 
Shirley H. Frondorf

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

SHIRLEY H. FRONDORF, being first duly sworn, upon her oath, deposes and says that she is a member of the Bar of this Court and one of the counsel of record for appellees in this cause; that on this 10th day of August, 1982, she mailed three copies of appellees' Motion to Dismiss in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Lawrence J. Evans Jr.
Attorney at Law
539 East Erie Drive
Tempe, Arizona 85282

and that he also mailed forty copies of appellees' Motion to Dismiss to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

Shirley H. Frondorf
SHIRLEY H. FRONDORF

SUBSCRIBED AND SWORN to before me this 10th day of August, 1982.

Gayle Westig
Notary Public

My commission expires:

My Commission Expires May 11, 1984

Office - Supreme Court, U.
FILED
AUG 23 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2375

IN THE

Supreme Court of the United States

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

(Motion for Reharing Denied, March 8, 1982; Petition for Review by the Arizona Supreme Court Denied, March 30, 1982)

OPPOSITION TO MOTION TO DISMISS

LAWRENCE J. EVANS JR.
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Appellant and Co-counsel
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MEMORANDUM OF LAW

Appellees have not addressed each and every Question Presented in appellant's Jurisdictional Statement. It has long been held that allegations, charges, or questions presented, if not either rebutted or explained with an affirmative defense, are deemed admitted. See *Federal Rule of Civil Procedure 8(d).* Neither proof nor finding is required in support of allegation admitted in pleading. *Mah Toi v. Brownell,* C.A.Cal.1955, 219 F.2d 642, certiorari denied 76 S.Ct. 49, 350 U.S. 823, 100 L.Ed. 735. Also, see *McComb v. Blue Star Auto Stores,* C.C.A.Ill.1947, 164 F.2d 329. See also, *Consolidated Packaging Machinery Corp. v. Kelly,* C.A.Ill.1958, 253 F.2d 49, certiorari denied 78 S.Ct. 1151, 357 U.S. 906, 2 L.Ed.2d 1156.

It is, therefore, respectfully submitted that each and every Question Presented which has not been specifically and definitively addressed by appellees must be regarded by the United States Supreme Court as an *admission* by the appellees.

Instead, appellees have obfuscated the issues presented in the Jurisdictional Statement by erring in their interpretation; and also by creating new alleged "issues" which they purport to be the "issues" that appellees would prefer to have the United States Supreme Court rule upon, rather that the federal questions presented by appellant.

APPELLEES' REASONS WHY THIS COURT'S JURISDICTION HAS NOT BEEN PROPERLY INVOKED

Some of the strange statements found in the Motion to Dismiss are that: "appellant has never drawn into question the validity of a statute of the State of Arizona." See page 5 of Motion to Dismiss for this strange statement. In the Appendix to Jurisdictional Statement on pages 64a and 65a, Violation of Due Process — 7, the validity of a statute of the State of Arizona is questioned. Also, on pages 66a and 67a, Violation of Due Process — 9, the validity of an administrative regulation is questioned. Appellees also state that: "... not even identified the state

statute upon which this Court's purported jurisdiction rests." Strange indeed that appellees are of the belief that the United States Supreme Court, the highest judicial arm of the country, has no jurisdiction over the alleged unconstitutional acts of state courts unless the respective state legislature passes a specific statute granting that jurisdiction. In any case, Article II, Section 3, Constitution of the State of Arizona, cited on pages 2, 3 and 8 of the Jurisdictional Statement, states that: "The Constitution of the United States is the supreme law of the land." Appellees apparently would now deny this Court the right to interpret violations of that Constitution.

Even stranger are appellees' statements of "Appellant's concerns . . ." and ". . . are based on appellant's belief . . ." Appellees have never been engaged or authorized to submit to any judicial authority the "concerns" and "beliefs" of the appellant. This is purely conjecture and rhetoric.

The violation of federal constitutional rights of due process were extensively briefed on pages 11 thru 20 of appellant's Motion for Oral Argument on Appellant's Appeal filed with the Superior Court of the State of Arizona on May 7, 1979 and is a part of the record in this matter.

The twenty federal questions raised by appellant in his Jurisdictional Statement could not be more decisive, pointed, pertinent, concise and detailed. For appellees to state that they could not reasonably ascertain the specific questions which are required to be answered is absurd and is an admission of inability to frame a reasoned alibi or excuse.

FEDERAL QUESTIONS

Appellees on page 6 state that appellant failed to submit the "federal claim or claims" purportedly put in issue and ignored." See Appendix to Jurisdictional Statement, pages 46a thru 76a, which placed the "federal questions" squarely succinctly, concisely and definitively drawn in question upon the Arizona Court of Appeals, and also upon the Arizona Supreme Court.

INTERPRETATION BY STATE COURT OF FEDERAL QUESTIONS

On page 7 appellees allege a "... state court's interpretation of state statutes ..." In this case the state court did not "interpret" any state statute under the violations of due process and violation of free speech submitted. See Motion for Rehearing, pages 46a thru 76a, Appendix to Jurisdictional Statement.

On page 8 appellees formulate, by rhetoric, an erroneous version of the federal question presented. They then embark upon a voyage of pure conjecture after "... assuming, arguendo, that issues had been identified and ruled upon as such in the state court." This is the very gravamen of the problem. The issues submitted by appellant in his Motion for Rehearing, and again those stated in his Jurisdictional Statement, were never ruled upon in the Arizona Court of Appeals or in the Arizona Supreme Court.

APPELLEE'S ALLEGED ISSUES

Appellee's Issue (1), on page 8 of their Motion to Dismiss, was appropriately covered in appellant's federal questions FOUR, FIVE, SIX, SEVEN, EIGHT, NINE, TWELVE, FIFTEEN, SIXTEEN, and NINETEEN of the Jurisdictional Statement. Further elaboration is unnecessary.

Appellee's Issue (2). on page 8 of their Motion to Dismiss, was appropriately coverd in appellant's federal question ONE of the Jurisdictional Statement. Further elaboration is unnecessary. The *true* issue is whether an administrative agency can summarily reject all findings of fact, conclusions of law and reach an opposite decision *not based upon any charge, any allegation, and on any corroborated, unrebutted or unimpeached evidence in the record.*

Appellee's Issue (3), on pages 8 and 9 of their Motion to Dismiss, was appropriately discussed in appellant's federal questions TEN and ELEVEN of the Jurisdictional Statement. Further elaboration is unnecessary.

For appellants, on page 9 of their Motion to Dismiss, to submit to the United States Supreme Court that: ". . . none were sufficiently identified and presented as a federal issue in the state court . . ." is an erroneous representation. See the Motion for Rehearing, pages 46a thru 76a, in the Jurisdictional Statement. They could not have been more clearly, concisely and definitively presented to the state court.

APPELLEE'S PREMISE

Appellee's premise is enunciated on page 9 of the Motion to Dismiss, wherein they aver that their case ". . . rests on an adequate non-federal basis." Thus, they summarily dismiss violations of federal and state constitutionally guaranteed rights of due process and free speech as being non-federal in nature. An amazing argument.

SCOPE OF ADMINISTRATIVE REVIEW

Appellee's argument is based upon the proposition that judicial interpretation by a state court cannot, by definition, be unconstitutional in its application. They assert that any act of a state judiciary must be "based upon a federal constitutional provision." Appellant submits that not only is their argument without merit but that appellees in all briefs submitted and in their oral arguments below did not support the ambiguous "reasonable evidence" standard but, instead, argued before the Superior Court and in their briefs to the Arizona Court of Appeals that "any evidence" was sufficient. It is noted that:

> "In approaching the question of substantiality of evidence, "any evidence" is not substantial evidence and bare conclusions, without supporting facts, are not substantial evidence; "substantial evidence" is valid, legal and persuasive evidence." *Pickens-Bond Const. Co. v. Case*, Ark., 584 S.W.2d 21, 25.

The final paragraph of Question Presented No. FIFTEEN, pages 20-22, Jurisdictional Statement, cites the constitutional provision violated.

Appellees cite *Board of Education of Tempe Union High School v. Lammle* in support of their lesser standard of "reasonable evidence. However, they neglect to inform the United States Supreme Court that: (1) this case was decided on April 10, 1979, over eighteen months *after* the evidentiary hearing was conducted and after the Personnel Board conducted its Open Meeting, during which time the law was that of "substantial evidence." (2) the "substantial evidence" rule was established by the highest state court, the Arizona Supreme Court, and not by the lower Court of Appeals. (3) The Arizona Supreme Court had not yet revised its standard of "substantial evidence" nor had either of those two courts held that any "reasonable evidence" standard would be *retroactively* effective. (4) Neither Court has yet set the standards for "reasonable evidence" nor has the legislature. (5) The United States Supreme Court has held on numerous occasions that the "substantial evidence" rule is required. See citations in Jurisdictional Statement.

Appellant has repeatedly asserted and identified the violation of his due process rights under the Fourteenth Amendment by making a lesser degree of evidence, without defining that degree of evidence, and without specifying that evidence, as making such a standard repugnant to the Constitution of the United States.

STATE PERSONNEL BOARD MAY REVERSE THE FINDINGS OF ITS HEARING OFFICER PROVIDED THAT IT IS DONE WITH A PREPONDERANCE OF EVIDENCE TO SUPPORT SUCH A REVERSAL AND WHEN THEIR FINDINGS ARE SUPPORTED BY CORROBORATED, UNREBUTTED OR UNIMPEACHED EVIDENCE; AND WHEN IT MAKES FINDINGS THEY ARE BASED ON CHARGES, ALLEGATIONS, TESTIMONY OR EVIDENCE IN THE RECORD.

Appellees have erred in representing appellant's position. Appellant has repeatedly submitted that the State Personnel Board has the power, authority and responsibility to reverse the findings of its Hearing Officer PROVIDED THAT it is done

when there is a preponderance of evidence to support their reversal; and PROVIDED THAT the preponderance of evidence is not based upon uncorroborated, rebutted or impeached evidence or testimony; and PROVIDED THAT there are charges, allegations, testimony and evidence in the record to support their reversal.

Appellees have also erred in representing appellant's position vis-a-vis the rules and regulations adopted by the Personnel Board. Appellant merely submits that when any rule or regulation, or portion thereof, is formulated without the specific authority of statute, or when it goes beyond the statute to expand powers not granted by statute, then that which has been promulgated by the Personnel Board beyond the powers granted by the legislature is null and void and is an *ultra vires* act.

The twenty federal questions presented in the Jurisdictional Statement are not solely applied to interpretation of state statutes and state agency regulation as appellee has submitted. They are addressed to violations of constitutionally protected rights of due process and free speech. However, appellant submits that appellees are in error when they state that "Interpretation of state statutes and state agency regulation is reserved to the appellate courts of the state, not to the federal courts." This bold assertion claims immunity of the state judiciary from the provisions of the United States Constitution. It is respectfully submitted that no such immunity exists. When state courts violate constitutionally protected rights of the citizen, the United States Supreme Court has the power, the responsibility and the duty to reverse such violations.

Appellees continually misrepresent appellant's position. Appellant has repeatedly submitted that the State Personnel Board has the power, authority and responsibility to reverse the findings of its Hearing Officer PROVIDED THAT it is done when there is a preponderance of evidence to support their reversal; and PROVIDED THAT the preponderance of evidence is not based upon uncorroborated, rebutted or impeached evidence or testi-

mony; and PROVIDED THAT there are charges, allegations, testimony and evidence in the record to support their reversal — not mere adversarial rhetoric.

"IMPROPER ATTITUDE" WAS IDENTIFIED AND LITIGATED IN THE STATE COURT.

The charge "improper attitude" was completely identified and litigated in the written briefs submitted by both parties to the Superior Court of Arizona. See pages 21 thru 48 of Appellant's Motion for Oral Argument on Appellant's Appeal filed with the Superior Court of the State of Arizona, dated May 7, 1979, and a part of the record in this matter.

Appellees failed to address this point in their oral argument, and now feel that, because of their failure to address this point in oral argument, they are now entitled to state that the subject was not litigated. Such was not the case. They had ample opportunity in their written briefs, which they took advantage of. Their failure to include this subject in their oral argument was entirely of their own choice and volition. They cannot now cry "we forgot to include this point in our oral argument, therefore it was not litigated."

It must also be noted that the highest court of the state did *not,* as averred by appellees, fail to pass on appellant's "federal questions" and overrule the Superior Court strictly on its interpretation of state law and authority. The highest court of the state is the Supreme Court of Arizona. It did not address any part of the issues; it summarily denied a petition for review without reviewing the complete record. Thus it was a lesser appellate court that overruled the Superior Court.

Insofar as *Arnett v. Kennedy,* cited by appellees, it must be noted that the State of California, in the leading case of *Skelly v. State Personnel Board,* 15 Cal.3d 194, 124 Cal.Reptr 14, at 28, 539 P.2d 774, applied the general principles of *Arnett v. Kennedy,* and after distilling the various opinions of the six justices of the Supreme Court of the United States, held that the

provisions of the California Personnel Act (which was virtually identical to the present Arizona Personnel Act, which was patterned upon the California Personnel Act) concerning the taking of punitive action against a permanent civil service employee did not fulfill minimum constitutional demands. The California Supreme Court held:

> "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." *Skelly v. State Personnel Board,* 124 Cal.Reptr 14, at 28-29.

It must be noted that one of the defenses of the appellant herein are that the record reveals that the preremoval safeguards were not complied with by the State of Arizona.

The First Amendment issue of free speech was thoroughly briefed before the Arizona Superior Court on pages 31-33 (FINDING OF FACT NO. 4) and on page 44 (CONCLUSION OF LAW NO. 4) of Appellant's Motion for Oral Argument on Appellant's Appeal filed with the Superior Court of the State of Arizona in and for the County of Maricopa, dated May 7, 1979. This brief was filed in both the Arizona Court of Appeals and in the Arizona Supreme Court as an Appendix to Appellee's Answering Brief (Appellant herein).

Finally there was no corroborated, unrebutted or unimpeached testimony in the record that appellant openly expressed attitudes of misuse, criticism, and hostility that were inconsistent with a workable employee relationship and that were highly disruptive to the agency. This is imaginative rhetoric. Judge Ellis M. Kopp, former U.S. Federal District Judge from New Jersey, after eight

days of evidentiary hearing found (See page 16a, REASON 6, of Appendix to Jurisdictional Statement) that the author of this statement testified while under oath "everything that I have heard or seen of his ability as a hearing officer was exempletory." (sic) There was no critical expression introduced in the record that could have undermined the effectiveness of the agency, which crossed the line from protective speech to disruptive attitude. This again is imaginative rhetoric, and no such critical expression in that degree was cited by the trier of fact former U.S. Federal District Judge Ellis M. Kopp at the evidentiary hearing; nor did present U.S. Federal District Judge Charles M. Hardy find so at the Superior Court level when he heard the case on appeal.

SUMMARY

Appellees' Motion to Dismiss is so far removed from the Jurisdictional Statement as to preclude any viable review of it by the United States Supreme Court. The "federal questions" raised were not addressed by appellees; and thus, if no answer be filed, every relevant and material "federal question" raised in the Jurisdictional Statement is at issue.

Finally, the shallow reasoning that violations of federal constitutionally protected rights of due process and free speech is permissable because the provisions of state statutes are immune to judicial review by the United States Supreme Court is the height of absurdity. Appellees' arguments are without merit.

CONCLUSION

For the above reasons this Court should note jurisdiction of this appeal.

Respectfully submitted,

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